Supreme Court, U.S.
FILED

No. 02- 021265

FEB 14 2003
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IN THE
Supreme Court of the United States

EXXONMOBIL GAS MARKETING COMPANY, A DIVISION OF EXXON MOBIL CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

152 pp
$ f/p

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QUESTIONS PRESENTED

1. Whether the rule mandating strict construction of exemptions from the Federal Energy Regulatory Commission's jurisdiction under the Natural Gas Act applies to offshore transportation pipelines.

2. Whether a pipeline that obtained a certificate of public convenience and necessity from the Commission to provide transportation service may abandon that jurisdictional service upon reclassification of its facilities without any findings by the Commission that abandonment is in the public interest.

RULE 29.6 STATEMENT

The petitioners are BP America Production Company, BP Energy Company, ExxonMobil Gas Marketing Company, and Texaco Natural Gas Inc.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner BP America Production Company states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

BP plc
BP America Inc.
BP Corporation North America Inc.
BP Company North America Inc.

BP Energy Company states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

BP plc
BP America Inc.
BP Corporation North America Inc.
BP Company North America Inc.
BP America Production Company.

ExxonMobil Gas Marketing Company states that it is a division of Exxon Mobil Corporation, and further states that there are no parent companies or publicly held companies that have a 10% or greater ownership interest in Exxon Mobil Corporation.

Texaco Natural Gas Inc. states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

ChevronTexaco Corporation
ChevronTexaco Overseas Petroleum Inc.
Chevron Asiatic Limited
Texaco Inc.

TEPI Holdings Inc.
Texaco Exploration and Production Inc.
Chevron U.S.A. Holdings Inc.
Chevron U.S.A. Inc.

PARTIES IN THE COURT BELOW

In addition to the parties listed in the caption, the following were parties, intervenors, and *amici* in the court of appeals:

Amerada Hess Corporation
Amoco Production Company
Amoco Energy Trading Corporation
Anadarko Petroleum Corporation
ANR Pipeline Company
Burlington Resources Oil & Gas Company L.P.
Dominion Exploration & Production, Inc.
Forest Oil Corporation
Independent Petroleum Association of America
Marathon Oil Company
Murphy Exploration & Production Company
Newfield Exploration Company
Ocean Energy, Inc.
Phillips Petroleum Company
Sea Robin Pipeline Company
The Houston Exploration Company
Total Exploration Production USA, Inc.
Walter Oil & Gas Corporation
Williams Gas Processing - Gulf Coast Co., L.P.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners BP America Production Company, BP Energy Company, ExxonMobil Gas Marketing Company, and Texaco Natural Gas Inc. ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is published at 297 F.3d 1071 (D.C. Cir. 2002), and is reproduced at Petition Appendix (Pet. App.) 1a-38a. The order denying the petition for rehearing en banc is not reported and is reproduced at Pet. App. 99a-100a. The orders of the FERC under review in this proceeding are published at 87 FERC ¶ 61,384 (1999), Pet. App. 74a-98a, and 92 FERC ¶ 61,072 (2000), Pet. App. 39a-73a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 6, 2002. The court of appeals denied Petitioners' petition for rehearing on October 22, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court extended the time for filing this petition to February 19, 2003.

STATUTORY PROVISIONS INVOLVED

The statutes at issue in this case are sections 1(b), 4, and 7 of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717(b), 717c, 717f, and are reprinted in Pet. App. 101a-108a.

STATEMENT OF THE CASE

In this case, a divided court of appeals upheld a FERC decision to reclassify over 370 miles of the Sea Robin pipeline on the Outer Continental Shelf ("OCS") as gathering

facilities exempt from the FERC's NGA jurisdiction, and to permit Sea Robin to abandon jurisdictional service provided over those facilities without the statutorily required determination by the Commission that abandonment is in the public interest. The decision below abrogates for offshore transportation pipelines the longstanding rule that exemptions from FERC jurisdiction are strictly construed and conflicts with multiple precedents of this Court and other courts of appeals. As Judge Edwards rightly declared in dissent, the FERC's relinquishment of jurisdiction over a previously certificated offshore pipeline "is perplexing on its own terms, and it is unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.* [v. *State Corp. Commission*, 372 U.S. 84 (1963)]." Pet. App. 35a.

The stakes of this case are enormous. The OCS holds this country's largest reserves of natural gas. As the FERC had previously acknowledged, if the Sea Robin pipeline "is found to be a gathering system" exempt from FERC regulation, "then it is likely that other pipelines on the OCS would also be found to have that status." *Sea Robin Pipeline Co.*, 71 FERC ¶ 61,351, 62,404 (1995). The decision below upsets reliance interests valued in the billions of dollars, *infra* at 10, 27-28, and opens the door for offshore pipelines to charge monopolistic rates without regulatory oversight, the very harm the NGA was enacted to prevent. This Court's immediate review is critical to resolve the conflicts of authority and to restore certainty to FERC's jurisdiction over offshore natural gas pipelines.

A. Statutory Framework

Because the Commerce Clause had been construed to deny States the power to regulate the transportation and sale for resale of natural gas in interstate commerce, in 1938 "Congress enacted the Gas Act to assure that consumers of natural gas receive a fair price and also to protect against the economic power of the interstate pipelines." *Maryland* v. *Louisiana*, 451 U.S. 725, 747-48 (1981). Section 1(b) of the

NGA grants the FERC jurisdiction to regulate "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale," and "natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b). That same section specifically excluded from FERC's jurisdiction "any other transportation or sale of natural gas," "the local distribution of natural gas or ... the facilities used for such distribution," and "the production or gathering of natural gas," *id.*, which were within the power of the States to regulate. Section 4 of the NGA authorizes the Commission to enforce the NGA's mandate that all rates "for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission ... shall be just and reasonable," and requires the filing of tariffs with the Commission setting forth the rates for any such services. *Id.* § 717c(a).

To ensure that the FERC may comprehensively exercise its jurisdiction, section 7(c) of the Act provides that no natural gas company "shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof" without "a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." *Id.* § 717f(c). Section 7(b) of the Act forbids any natural gas company to "abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing," and without, among other things, "a finding by the Commission ... that the present or future public convenience or necessity permit such abandonment." *Id.* § 717f(b).

B. The Sea Robin Pipeline

The Sea Robin pipeline is a 438-mile pipeline in the shape of an inverted Y that lies mostly in shallow water on the OCS

portion of the Gulf of Mexico. Pet. App. 7a. The legs of the Y comprise well over three quarters of the system extending southwest and southeast across the OCS, and are composed mainly of pipes varying in diameter from 20 to 30 inches. These two legs intersect at the offshore Vermilion 149 Compression Station, where the gas converges before continuing north up 66.3 miles through a single 36-inch pipe that runs to the onshore Erath Compressor Station in southern Louisiana. *Id.* Apart from commingling and continued pressurization of the two natural gas flows, nothing else happens to the gas passing through the Vermilion Station. At varying points on the OCS, lateral lines, some with pipes as small as 4.5 inches, connect production platforms to Sea Robin's major arteries both upstream and downstream of the fork in the Y. Natural gas is first separated, dehydrated, and measured at these production platforms prior to delivery to Sea Robin. In addition, one of the pipeline legs upstream (*i.e.*, south) of the Vermilion Station interconnects with the Garden Banks pipeline, which provides interstate transportation service under a certificate of public convenience and necessity issued by FERC. Gas flows from Garden Banks into the Sea Robin system, is commingled with other gas, and continues downstream as described above. *Id.* at 7a, 15a. Once onshore, the gas is separated, dehydrated, and processed before being delivered to multiple interstate pipelines at the Erath Compressor for downstream delivery on land. *Id.* at 6a.

Sea Robin was initially a joint venture between two interstate pipeline companies, and was sized to conform with the Commission's policy of encouraging a limited number of high-volume pipelines on the OCS. See 18 C.F.R. § 2.65. In 1969, the FERC authorized the initial construction and operation of Sea Robin's system as a transportation facility by issuing a certificate of public convenience and necessity pursuant to NGA § 7(c). *Sea Robin Pipeline Co.*, 41 FPC 257, 260-61 (1969). This certificate not only authorized the

construction of the physical facilities, but also authorized jurisdictional transportation and sales service on those facilities. *Id.* Although a significant portion of Sea Robin's capacity was initially devoted to the transportation of gas volumes that Sea Robin's two owner-shippers acquired from producers at the platforms, Sea Robin was also designed to provide unbundled transportation for others. *Id.* at 258. To accommodate requests for jurisdictional transportation service from third-party shippers, the Commission certificated expansions of Sea Robin's system throughout the 1970's in reliance on Sea Robin's own characterization of its facilities as jurisdictional transportation facilities.[1] Sea Robin benefited from the transportation status it requested and received in its initial certificate application, and, over time, that status has been reconfirmed.

C. Reclassification Proceedings

In 1995, without any precipitating change in the pipeline's physical configuration or function, Sea Robin petitioned FERC to reclassify its entire offshore pipeline system from an interstate transportation pipeline subject to FERC's regulatory jurisdiction to an exempt gathering system. Sea Robin sought to discontinue its tariffed jurisdictional transportation services that were subject to rate regulation by the FERC, and stated that it would negotiate unregulated "gathering" rates with its shippers. See *Sea Robin Pipeline Co.*, 71 FERC at 62,388-89.

In 1995, applying its "primary function" test, FERC denied the petition because "Sea Robin provides services that are clearly transportation under the Natural Gas Act." *Id.* at 62,404. The FERC relied principally on the fact that Sea Robin's pipeline, 77% of which consists of pipe more than 20 inches in diameter, "is of the diameter and length that are more typical of an interstate transportation system rather than

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[1] *Sea Robin Pipeline Co.*, 43 FPC 108 (1970); *Tennessee Gas Pipeline Co.*, 47 FPC 1486 (1972); *Sea Robin Pipeline Co.*, 51 FPC 1221 (1974); *Sea Robin Pipeline Co.*, 58 FPC 2401 (1977); Pet. App. 84a-85a n.26.

an exempt gathering system." *Id.* at 62,398. The Commission noted that even in the offshore context it had never found such long high-capacity lines to be gathering facilities. *Id.* at 62,398-99. The Commission further ruled that the laterals and wells on the Sea Robin system did not indicate a gathering function, and noted that the laterals were part of an integrated pipeline system. *Id.* The Commission added that the Y-shaped configuration of the pipeline was not indicative of gathering because "[m]any on-shore interstate pipelines also have an inverted 'Y' or 'V' configuration," which simply reflects carriage from supply sources at multiple locations. *Id.* at 62,402. The Commission also found a variety of nonphysical factors to support its transportation classification. *Id.* at 62,403-05.

On appeal, the Fifth Circuit vacated and remanded FERC's orders, finding that FERC had given too much weight to the size and length of the system in a manner inconsistent with its prior "sliding scale" approach. *Sea Robin Pipeline Co.* v. *FERC*, 127 F.3d 365, 370 (5th Cir. 1997) ("*Sea Robin I*"). The Fifth Circuit also held that in applying this "primary function" test to Sea Robin's system, FERC placed too much emphasis on non-physical factors versus physical factors. *Id.* at 371. Finally, the Fifth Circuit suggested that the FERC reformulate a "primary function" test specific to the offshore context if necessary. *Id.* at 367.

On remand from the Fifth Circuit, FERC reversed course, reclassifying the bulk of Sea Robin's system – *i.e.*, that portion upstream (south) of its offshore Vermilion 149 Compressor Station – as nonjurisdictional gathering facilities. See Pet. App. 40a, 87a-93a. The FERC relied principally on the greater number of wells feeding into the system upstream of that point, the change in diameter of the pipe from 30 to 36 inches at Vermilion Station, and the need for increased compression for the last part of the journey. *Id.* at 59a-60a, 84a-86a & n.26, 87a-90a. The FERC ordered Sea Robin's certificates of public convenience and necessity "rescinded to

the extent necessary to reflect the jurisdictional findings," and ordered Sea Robin to file new tariff sheets "specifying separately stated gathering rates." *Id.* at 93a.

On appeal to the DC Circuit, a divided court of appeals upheld the FERC's reclassification orders. The majority declared the jurisdictional grant of the NGA to be a statute of "inherent ambiguity," Pet. App. 18a, and stated it would uphold any line drawn by the FERC that was not "'patently unreasonable.'" *Id.* at 19a-20a. The majority acknowledged this Court's rulings that exemptions from NGA jurisdiction are strictly construed, and in particular that the "gathering" exemption is "narrowly confined" to the physical act of "preparing [gas] for the first stages of distribution," *Northern Natural Gas Co.* v. *State Corp. Commission*, 372 U.S. 84, 90 (1963). Pet. App. 20a. It held, however, that this rule had little force in the context of offshore pipelines providing "unbundled" transportation service to shippers. *Id.* at 21a-22a. The majority saw no reason why FERC could not make a fork in the pipeline the demarcation point of its jurisdiction, given the physical factors the Commission had cited. *Id.* at 19a. The majority also ruled that Sea Robin could abandon its tariffed jurisdictional transportation service without a finding by FERC after a hearing that abandonment was in the public interest. *Id.* at 25a. It held that Sea Robin was not abandoning service because it would provide the same service under its exempt status. *Id.* Moreover, it held that the abandonment statute did not apply to nonjurisdictional facilities. *Id.*

Judge Edwards dissented. He observed that FERC's decision is "difficult to square with the language of the statute, with the language of the Supreme Court, and the holding (as opposed to the dicta) of the Fifth Circuit." Pet. App. 37a. Vermilion was merely a junction in the pipeline, and FERC's reclassification violated the rule of *Northern Natural* because the agency failed to identify any discrete "'physical acts'" that would constitute gathering as defined by

this Court. *Id.* at 32a-33a (emphasis omitted). Judge Edwards further declared that FERC's order not only is inconsistent with the record and FERC's prior decisions, but also "becomes positively absurd when it is considered" that other jurisdictional pipelines feed into Sea Robin upstream of Vermilion, creating the untenable anomaly of "gas being *transported* to where it is *gathered* only then to be *transported* again." *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision that the last fork in an interstate natural gas pipeline can mark the dividing line between "transportation of natural gas in interstate commerce" within the exclusive jurisdiction of the FERC under the NGA, and the "production or gathering" that is exempt from federal jurisdiction, 15 U.S.C. § 717(b), is in dramatic conflict with the longstanding NGA precedent of this Court and other courts of appeals. This Court has long held that natural gas is considered to be transported in interstate commerce when "the gas enters the pipeline carrier and moves on continuously to its outside market" with "'no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line.'" *Michigan-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 167 (1954) (quoting *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277, 281 (1921)). Accordingly, the production and gathering exemption is "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural*, 372 U.S. at 90. In place of the "bright line" that Congress drew in the NGA in 1938 between the domains of federal and state regulation based on this Court's contemporaneous Commerce Clause jurisprudence, *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 377, 380 (1983); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 506-08 (1942), the D.C. Circuit has

improperly declared the NGA to be a statute of "inherent ambiguity" that permits arbitrary jurisdictional segregation of parts of a single interstate pipeline system based on an indeterminate multifactor balancing test. Pet. App. 18a-20a.

The D.C. Circuit further muddied the waters by holding, without basis, that the rule that exemptions from the FERC's NGA jurisdiction are to be "narrowly construed" has force only when interstate transportation is bundled with an interstate sale. Pet. App. 21a-22a. That holding is insupportable as a matter of statutory construction. More fundamentally, it is in direct conflict with the decisions of other courts of appeals and of this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), which applied the strict-construction rule to the FERC's transportation jurisdiction. *Id.* at 640-41.

The decision below is also contrary to decisions of this Court and other courts of appeals that the abandonment of any jurisdictional service can only be accomplished in compliance with the protections of section 7(b) of the NGA, 15 U.S.C. § 717f(b). Sea Robin has long provided a tariffed, integrated interstate transportation service over the entirety of its pipeline system pursuant to certificates of public convenience and necessity. It sought decertification of its system for the precise purpose of terminating that service, and in fact did so promptly upon the FERC's order below, substituting separate gathering and transportation services over portions of its system. See Pet. App. 93a. This Court has held that once an entity has dedicated its facilities to an interstate service, it cannot unilaterally cease providing that service absent a determination by the Commission that abandonment is in the public interest. Arrogation to Sea Robin of the ability to exercise monopoly power over shippers upstream of Vermilion station is clearly not in the public interest and could not have survived abandonment review. The D.C. Circuit's abandonment ruling impermissibly erodes the

authority of the Commission to control the monopoly power of pipelines under the NGA.

This is a case of extraordinary importance. As the FERC has previously indicated, reclassification of a pipeline with Sea Robin's physical characteristics as a gathering facility would effectively open much of the OCS pipeline infrastructure (where multitrunk pipeline configurations are common) to jurisdictional reclassification. Sea Robin and other pipelines seek reclassification of their previously certificated transportation facilities to escape rate regulation under the NGA, which severely undercuts considerable reliance interests. Billions of dollars have been spent by producers and shippers in developing OCS gas reserves in reliance upon the jurisdictional status of the pipelines that would carry the gas ashore and upon the protections afforded by FERC's rate regulation. The acquiescence of the majority below in the FERC's piecemeal surrender of its own jurisdiction over portions of these facilities undermines the overall regulatory scheme as applied to offshore pipelines, and exposes vast production volumes to excessive transportation rates free of NGA regulation. In contrast to the onshore context, where state regulators could step in to prevent the abuse of monopoly power, the states have no such power on the OCS. Given the importance of the OCS to the nation's natural gas supply, and the centrality of the *Northern Natural* rule and the section 7(b) abandonment process to rational regulation of OCS pipelines, this Court's immediate review is necessary.

I. THE D.C. CIRCUIT'S CONSTRUCTION OF THE FERC'S TRANSPORTATION JURISDICTION CONFLICTS WITH PRECEDENTS OF THIS COURT AND OTHER COURTS OF APPEALS.

The NGA was enacted in 1938 "in response to reports suggesting that the monopoly power of interstate pipelines was harming consumer welfare." *Public Serv. Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 327 (1983). Interstate

pipelines had been largely unregulated after Congress excluded natural gas pipelines from the jurisdiction of the Interstate Commerce Commission in 1906, ch. 3591, § 1, 34 Stat. 584, 584 (1906), and after this Court handed down a series of decisions under the dormant Commerce Clause prohibiting the States from regulating pipelines and utilities that engaged in wholesale sales or transportation of energy across state lines. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).[2] Concerned about reported abuses of power by the pipelines, Congress enacted the NGA "'to occupy this field in which the Supreme Court has held that the States may not act.'" *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 185 (1983) (emphasis omitted) (quoting H.R. Rep. No. 75-709, at 1-2 (1937)). Congress accomplished its occupation of the field by granting a federal agency – first the Federal Power Commission and later FERC – exclusive jurisdiction to "regulat[e] the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation." *Illinois Natural Gas Co.*, 314 U.S. at 506; *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 301, 305 (1988).

This Court's Commerce Clause doctrine as of 1938 thus sets the metes and bounds of FERC's jurisdiction under the NGA, and defines the phrases "transportation in interstate commerce" and "production and gathering" in section 1(b) of the Act. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684 (1954) ("[I]t is well settled that ... the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate

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[2] *See Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924) (State could not limit transportation of natural gas to other States); *Public Utils. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (State could not regulate the rates of instate sales of electricity that is destined for other States), *overruled by Arkansas Elec.*, 461 U.S. at 393.

commerce."). Under Commerce Clause doctrine of the time, States were strictly forbidden to impose any "direct burden" on interstate commerce through regulation or taxation. *Public Utils. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 88-90 (1927), *overruled on other grounds by* 461 U.S. 375 (1983); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298, 307-08 (1924); *Minnesota Rate Cases*, 230 U.S. 352, 369-97 (1913). This Court enforced that prohibition by drawing categorical lines between "interstate commerce" and activities that were "essentially local." *Kansas Natural Gas*, 265 U.S. at 308; *Pennsylvania Gas Co.* v. *Public Serv. Comm'n*, 252 U.S. 23, 31 (1920). The longstanding rule of this Court was that goods enter interstate commerce when "they commence their final movement for transportation from the State of their origin to that of their destination," and in particular when "they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State." *Coe* v. *Errol*, 116 U.S. 517, 525 (1886).

That same rule applied to natural gas. Gas was deemed transported in interstate commerce (and thus immune from state regulation or taxation under pre-NGA Commerce Clause jurisprudence) when "the gas enters the pipeline carrier and moves on continuously to its outside market" with "'no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line.'" *Michigan-Wis. Pipe Line*, 347 U.S. at 167 (quoting *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277, 281 (1921)) (state cannot tax as "gathering" the pipeline carrier's taking of gas from the producer's gasoline plant). Thus, the test for segregating intrastate from interstate commerce, even for continuous energy flows, was whether an activity could be identified that was "essentially local in character *and complete in itself*" and not "so linked with the transmission as to make it an inseparable part of a transaction in interstate

commerce." *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165, 178-79 (1932) (emphasis added); *Michigan-Wis. Pipe Line*, 347 U.S. at 167; *Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80, 87 (1948) (State may only burden an activity "sufficiently separate" from interstate commerce in gas); *Public Utils. Comm'n* v. *Landon*, 249 U.S. 236, 245 (retail distribution is local and thus "[i]nterstate movement ended when the gas passed into local mains"), *decree vacated and revised by* 249 U.S. 590 (1919).

In section 1(b) of the NGA, Congress adopted the "'mechanical' line" of this Court's Commerce Clause cases "as the statutory line dividing federal and state jurisdiction." *Arkansas Elec.*, 461 U.S. at 380. Congress granted the FERC power to regulate "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale," and "natural-gas companies engaged in such transportation or sale," but specifically excluded "any other transportation or sale of natural gas," "the local distribution of natural gas or ... the facilities used for such distribution," and "the production or gathering of natural gas." 15 U.S.C. § 717(b). These were the activities that were not considered to be interstate commerce at the time of the Act, and the section 1(b) exemptions simply identified the intrastate commercial activities that were within the domain of the States as of that time. *FPC* v. *East Ohio*, 338 U.S. 464, 470-71 nn.10-11 (1950); H.R. Rep. No. 75-709, at 3-4 (1937).

It is precisely because state power over the business of energy in 1938 was constitutionally limited to activity "essentially local in character and complete in itself" and not "so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce," *Utah Power & Light*, 286 U.S. at 178-79, that this Court in *Northern Natural* held that the "'production' and 'gathering'" exemption of section 1(b) is "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." 372 U.S. at 90. Gathering (whether

performed by a producer or third party) is limited to that collection activity "essentially local in character and complete in itself" and not inexorably part of interstate commerce, *Michigan-Wis. Pipe Line*, 347 U.S. at 168; after all, gas must be gathered prior to wholly intrastate transportation as well. Indeed, states freely regulated gathering rates prior to the NGA. See *Phillips*, 347 U.S. at 693 (Clark, J., dissenting).

The decision below directly conflicts with, and effectively abrogates, the rule of *Northern Natural*. The D.C. Circuit held that the "narrowly confined" standard has little force in classifying the offshore movement of gas unless bundled with a jurisdictional sale, Pet. App. 20a-22a, and that any classification by FERC based on the physical attributes of the pipeline system under its "primary function" test would be upheld if not "'patently unreasonable.'" *Id.* at 19a-20a. According to the court below, because of the "different physical realities" of the OCS, which may entail longer gathering facilities, "what might not seem 'narrowly confined' in the on-shore context, may well be on the Outer Continental Shelf." *Id.* at 20a.

That ruling misconceives *Northern Natural* and the entire structure of the NGA, and at a minimum raises an issue that only this Court can resolve. The "narrowly confined" standard describes the scope of the statutory exemption, not the physical measure of gathering facilities. *Northern Natural* requires that any exemption from FERC jurisdiction be "narrowly confined" to activities wholly outside of interstate commerce under this Court's prior decisions. The physical characteristics of a pipeline may be relevant to that determination, and indeed the FERC has employed some variant of its "primary function test" for decades. Pet. App. 3a-5a. But the inquiry must always be whether there is a "distinct local activity" of gathering and a "separate movement in commerce." *Michigan-Wis. Pipe Line*, 347 U.S. at 167. As Judge Edwards stated in dissent, FERC failed to identify any such distinct activity in limiting its jurisdiction to

that part of the Sea Robin system downstream of the Vermilion station:

> Vermilion is merely a junction in the pipeline, where gas from two preceding forks in the pipeline road come together before the gas travels north in one pipe instead of two. Nothing else of any consequence happens at Vermilion – nothing. Surely a "fork in the road" cannot be the demarcation line between unregulated production/gathering and regulated transportation. Vermilion is not a place where Sea Robin engages in any "*physical acts of drawing the gas from the earth and preparing it for the first stages of distribution*"; it is not, therefore, a place of production and gathering as those terms have been "narrowly" defined by the Supreme Court.

Pet. App. 32a-33a.

In allowing the FERC's assessment of the physical configuration of the pipeline to determine jurisdiction, without identification of any distinct preparatory activity separate from the interstate transport of the gas, the decision below conflicts with this Court's decision in *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682 (1947). In that case, this Court held that the Commission's jurisdiction should not turn on "subsidiary questions such as whether the sales were made from petitioner's 'gathering' lines or from petitioner's 'transmission' lines and whether the gathering process continued to the points of sale." *Id.* at 692. The Court regarded sales of gas for resale in another state as "in interstate commerce" even before the gas was pressurized by the purchasing companies for interstate transportation: "[l]ong before the gas reaches the compressor pumps it has been committed to its interstate journey which follows without interruption or deviation." *Id.* at 689. It rejected the claim that such sales were exempt as "production and gathering," for "[e]xceptions to the primary grant of jurisdiction in the section are to be strictly construed." *Id.* at 690-91. The

regulation of such sales was "predominately a matter of national, as contrasted to local concern," for the very purpose of the NGA was to avoid the malady where "[u]nreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of cost which must be covered by rates charged subsequent purchasers of the gas including the ultimate consumer." *Id.* at 692-93. See also *Phillips*, 347 U.S. at 677-78 (invoking strict construction rule to hold that "production and gathering, in the sense that those terms are used in § 1(b), end before the sales" of an independent producer in interstate commerce, and rejecting the interpretation of the exemption as comprehending "sales incident to the physical activity of collecting and processing the gas").

The majority's attempt to distinguish the strict-construction rule as limited to the "bundled" transportation and sales environment that predated the FERC's Order 636, Pet. App. 21a-22a, is insupportable and contrary to this Court's precedent. It is true, as the D.C. Circuit observed in *Conoco, Inc.* v. *FERC*, 90 F.3d 536 (D.C. Cir. 1996), that the Court has often applied the strict construction rule in cases like *Phillips*, which involved companies that "bundled together jurisdictional and nonjurisdictional activities." *Id.* at 545. But that would not distinguish this case; even under FERC's view, Sea Robin had bundled jurisdictional transportation (downstream of Vermilion) and nonjurisdictional gathering (upstream of Vermilion) in a single tariffed service. The majority below, however, misread its prior decision in *Conoco* as stating that this Court applied the strict-construction rule only to interstate pipelines that bundled two *jurisdictional* services (interstate sales and transportation), which is no longer the norm after the FERC mandated open access in Order 636. Pet. App. 21a.[3] The majority's position

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[3] *Pipeline Service Obligations and Revisions To Regulations Governing Self-Implementing Transportation; Regulation of Natural Gas Pipelines*

makes no sense; *Phillips* and *Interstate Natural Gas* involved sales by producers, not interstate pipelines, and neither case had anything to do with the bundled interstate sales and transportation by pipelines that were affected by Order 636. Thus, the majority's refusal to apply the strict-construction rule to Sea Robin simply because it is "strictly a transportation system," *id.*, is based on a patent misunderstanding of this Court's precedent.

Indeed, this error places the D.C. Circuit's decision in yet another square conflict with other precedents of this Court. The NGA grants of jurisdiction over transportation and interstate sales are "separate," and each has "independent and equally important places in the Act." *East Ohio*, 338 U.S. at 468. Both "transportation and sale do not include production or gathering," *Phillips*, 347 U.S. at 678 (brackets and internal quotation marks omitted), and this Court has firmly rejected the proposition that a section 1(b) exemption can "mean one thing for 'transportation' and another where 'sale for resale' is involved." *East Ohio*, 338 U.S. at 473.

Indeed, this Court has strictly construed section 1(b) exemptions in a case when only the Commission's transportation jurisdiction was at issue. *Louisiana Power & Light*, 406 U.S. at 638-41 (finding FPC's transportation jurisdiction authorized curtailment of direct interstate sales to consumers, even though section 1(b) exempted such sales from FERC's jurisdiction). In that case, this Court noted that Congress had created federal jurisdiction in the NGA to be "broadly complementary" to state power as it was then understood, and "[t]his congressional blueprint has guided judicial interpretation of the broad language defining FPC jurisdiction." *Id.* at 631. Thus, this Court declared that when questions of federal jurisdiction arise, it is "'not inclined to approach the problem negatively,'" and would instead resolve "'borderline'" cases in favor of that jurisdiction. *Id.*

After Wellhead Decontrol, [1991-1996 Transfer Binder] FERC Stats. & Regs. (CCH) ¶ 30,939 (Apr. 8, 1992) (subsequent history omitted).

Other courts of appeals have likewise applied the strict-construction rule to cases solely involving FERC's transportation jurisdiction, including "unbundled" transportation. *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1271 (8th Cir. 1991); *Cascade Natural Gas Corp.* v. *FERC*, 955 F.2d 1412, 1418 (10th Cir. 1992); *Public Serv. Comm'n* v. *FERC*, 610 F.2d 439, 444 n.22 (6th Cir. 1979). Indeed, the Fifth Circuit, reviewing the prior order in this proceeding, held that the strict construction rule applied, and reversed only because the FERC had departed from its prior application of the primary function test and had placed too much weight upon factors unrelated to the physical activity performed by the pipeline. See *Sea Robin I*, 127 F.3d at 368.

The rule that FERC jurisdiction is to be construed broadly (and exemptions construed strictly) has nothing to do with which jurisdictional grant is at issue. Rather, it derives from congressional intent to occupy the field of interstate commerce in natural gas. In enacting the NGA, Congress well understood that "interstate commerce is a practical conception" intended to ensure effective national regulation, *Eureka Pipe Line Co.* v. *Hallanan*, 257 U.S. 265, 272 (1921), and it has always been broadly construed to encompass all "integrated activity" that is "'so closely related to interstate transportation as to be practically a part of it.'" *Michigan-Wis. Pipe Line*, 347 U.S. at 167-68.

This case thus presents an easy case at the heart of the FERC's jurisdiction over transportation of gas in interstate commerce. Delivery to an interstate carrier for an uninterrupted journey across state lines has always been the marker of transportation in interstate commerce. *Coe*, 116 U.S. at 525; *Michigan-Wis. Pipe Line*, 347 U.S. at 167. The movement of gas throughout the Sea Robin system clearly falls within "the broad base of 'transportation' jurisdiction granted the [FERC]," *Louisiana Power & Light*, 406 U.S. at 640, which extends to any movements of gas interstate, whether for hire or not, *East Ohio*, 338 U.S. at 469. If

distinctions between transportation and gathering were based solely on the physical configuration of pipeline systems, they might indeed be "inherently elusive," Pet. App. 19a, but that is not the test of the NGA. See *J.M. Huber Corp.* v. *FPC*, 236 F.2d 550, 557 (3d Cir. 1956) ("gathering" cannot be determined solely by the physical configuration of the pipeline, for "[t]he true test is the use and service of the valves and pipe"). Gathering under section 1(b) is "narrowly confined to the physical act[] of ... preparing [gas] for the first stages of distribution," *Northern Natural*, 372 U.S. at 90, and the movement of gas in one segment of a carrier's pipeline cannot be deemed exempt gathering if "from a practical standpoint" the "economic process is inherently unsusceptible of division into a distinct local activity ..., on the one hand, and a separate movement in commerce, on the other." *Michigan-Wis. Pipe Line*, 347 U.S. at 167. "[W]here the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end, the 'paramount interest is not local but national, admitting of and requiring uniformity of regulation.'" *Attleboro*, 273 U.S. at 89 (quoting *Kansas Natural Gas*, 265 U.S. at 309-10). The Sea Robin system in its entirety, and certainly its main transmission trunks, provide "transportation of natural gas in interstate commerce" within the FERC's jurisdiction, 15 U.S.C. § 717(b).[4]

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[4] Besides conflicting with the precedent of this Court, the approach blessed by the court below leads to arbitrary results. The FERC had previously rejected Sea Robin's petition for reclassification by relying upon, among other factors, the very large size of the system and the diameter of the pipes as indicative of transportation. *Sea Robin Pipeline Co.*, 71 FERC at 62,398. On remand, the FERC reversed course, relying principally on the change from 30" to 36" pipes at Vermilion; the need for additional compression at that point; and the greater number of lateral lines and production platforms upstream of Vermilion than downstream. Pet. App. 59a-60a, 84a-86a & n.26, 87a-88a. But as Judge Edwards pointed out in dissent, "those characteristics (size, pressure, configuration) are entirely compatible with a transportation function," *id.* at 33a; the Vermilion station pressurizes the line both upstream and downstream; and

Finally, the crowning flaw of the majority's standardless approach is its creation of the untenable regulatory situation in which a regulated interstate "transportation" pipeline (Garden Banks) now flows downstream into a nonjurisdictional "gathering" facility (Sea Robin upstream of Vermilion) before continuing back into a regulated interstate pipeline (Sea Robin downstream of Vermilion). As Judge Edwards points out, it is "facially illogical" for gas to be "*transported* to where it is *gathered* only then to be *transported* again." Pet. App. 35a. Indeed, FERC has acknowledged both before and *after* the decision below that "it would be incongruous for gas flowing on an upstream transportation line to be delivered into a downstream gathering line." *Dauphin Island Gathering Sys.*, 93 FERC ¶ 61,198, 61,652 (2000); Letter from Pat Wood, III, Chairman, to Hon. Norman Y. Mineta, Secretary of Transportation 4 (Dec. 20, 2002) ("Under the primary function test, a gathering line cannot be downstream of a jurisdictional line.").

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the FERC had previously ruled that the "quite wide" 30" upstream pipes were "'more typical of an interstate transportation system rather than an exempt gathering system.'" *Id.* at 34a. In almost any multi-line interstate pipeline system, offshore or onshore, there will be more pipeline laterals and wells upstream of the final point of convergence, and often larger transmission pipes downstream of that point than upstream. The point where an interstate pipeline system converges into a single trunk simply cannot be the demarcation between transportation and gathering. Furthermore, the main Sea Robin system (including the Y-shaped mains) was certificated by FERC for interstate transportation beginning in 1969 before the lateral lines and platforms were built. Given that there has been no change in the service provided over Sea Robin's main trunks, FERC's jurisdiction cannot shift and slide over the years based on the happenstance of where production wells are later drilled and new lateral connections are made. And if further evidence of the arbitrariness of its approach were needed, the majority suggested that applying the FERC's test it "might draw the line at Erath," Sea Robin's onshore processing facility in Louisiana. *Id.* at 18a. Any test that would permit a large, longline pipeline like Sea Robin transporting gas across state lines to be classified as performing the "essentially local" activity of "gathering" is irreconcilable with the NGA.

The "positively absurd" result of a transportation line delivering gas to a gathering line, Pet. App. 35a., is avoided when exemptions from the FERC's jurisdiction are strictly construed, and "gathering" is "narrowly confined" to the circumstance where the agency can identify a distinct local activity separate from interstate commerce of "preparing [gas] for the first stages of distribution." *Northern Natural*, 372 U.S. at 90. Here, there is no question that Sea Robin performs the same function for petitioners' gas as for the Garden Banks gas with which it is commingled: interstate transportation. The majority shrugged off this anomaly by stating that perhaps Garden Banks should be reclassified. Pet. App. 23a. Nevertheless, it held that the jurisdictional status of adjoining pipelines did not affect the reasonableness of FERC's classification, and thus FERC would be free to maintain this absurdity if, in the future, it judged the physical characteristics of the Garden Banks line to be more indicative of transportation than gathering. *Id.* at 23a-24a. The NGA cannot be interpreted to produce such absurd results.[6]

The decision below injects radical indeterminacy into an important regulatory arena where reliance interests are at a premium; breaks with decades of precedent of this Court on the scope of the FERC's jurisdiction over interstate

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[6] Under the *Lo-Vaca* doctrine, federal jurisdiction attaches to the whole of a gas stream if any part thereof has been transported in interstate commerce. *See California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965). By analogy, once interstate transportation of gas begins in Garden Banks, the jurisdictional nature of the activity does not change until delivery to distribution facilities at the end of the journey. Jurisdictional transportation does not cease upon delivery to Sea Robin only to resume at Vermilion 149. It would also be highly artificial to conceive of the same pipes as "gathering" gas molecules from platforms connected to its system at the same time they are "transporting" molecules from Garden Banks, but in any event the *Lo-Vaca* doctrine declares that such distinctions do not affect the Commission's jurisdiction: so long as any part of the gas is in interstate transportation, the entire stream is within the Commission's jurisdiction.

transportation; and, for offshore transportation pipelines, abrogates without cause the longstanding rule that exemptions from NGA jurisdiction must be strictly construed. This Court's review is imperative.

II. THE DECISION BELOW IS CONTRARY TO THE STATUTORY REQUIREMENT THAT NO JURISDICTIONAL SERVICE MAY BE ABANDONED UNLESS APPROVED BY FERC AS IN THE PUBLIC INTEREST.

Because the NGA was "framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges," *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 388 (1959), Congress granted FERC the power to "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." *California* v. *Southland Royalty Co.*, 436 U.S. 519, 524 (1978). Thus, section 7(c) of the NGA authorizes FERC to grant certificates of public convenience and necessity for jurisdictional services and facilities, 15 U.S.C. § 717f(c), and section 7(b) provides that "[n]o natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities" without the Commission's prior approval after a hearing, and its determination "that the present or future public convenience or necessity permit such abandonment." *Id.* § 717f(b). This Court has declared it

> "beyond argument" that the proscription of abandoning "any service" rendered by facilities under federal jurisdiction "would include both transportation and sale" of dedicated gas reserves, *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83, 87 (1966), and ha[s] noted that § 7(b) "simply does not admit of any exception to the statutory procedure." *United Gas Pipe Line Co.* v. *McCombs*, 442 U.S. [529,] 536 [(1979)].

Northwest Cent. Pipeline Corp. v. *State Corp. Comm'n*, 489 U.S. 493, 520 n.17 (1989).

The D.C. Circuit nonetheless permitted Sea Robin to abandon the certificated transportation service that it has long provided over the entirety of its system without the public-interest hearing and determinations required by section 7(b). The court of appeals brushed aside petitioner's 7(b) arguments by stating that "Sea Robin does not seek to abandon any facilities or services," but rather "to continue operating previously certificated facilities as gathering facilities, exempt from FERC's jurisdiction." Pet. App. 25a. This finding fails to recognize that jurisdictional transportation services are being terminated by Sea Robin, and are being replaced by nonjurisdictional gathering services. The cessation of jurisdictional service constitutes an abandonment of service subject to section 7(b) of the NGA. Nevertheless, the majority construed section 7(b) as only "appl[ying] to jurisdictional facilities," *id.*, thus ignoring the plain meaning of the statute, which specifically requires that abandonment be authorized for any jurisdictional "service" as well as for jurisdictional "facilities." 15 U.S.C. § 717f(b).

This ruling is fundamentally contrary to this Court's longstanding construction of the Act's abandonment requirements, as applied to both services and facilities. The central concept in this Court's cases is that "[t]he initiation of interstate service pursuant to the certificate [of public convenience and necessity] dedicated all fields subject to that certificate" to the interstate market. *Southland Royalty*, 436 U.S. at 525. Upon issuance of the certificate, "the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.'" *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 156 (1960). Dedication does not mean that the gas flowing in a certificated pipeline is "surrendered to the public"; rather, "it

is simply placed within the jurisdiction of the Commission, so that it may be sold to the public at the 'just and reasonable' rates specified by § 4 (a) of the Act, 15 U.S.C. § 717c (a)." *Southland Royalty*, 436 U.S. at 527. The issuance of a certificate under section 7(c) "create[s] a federal obligation to serve the interstate market until abandonment authorization had been obtained"; that action cannot be undone by unilateral action of regulated entities, for "otherwise producers and pipelines would be free to make arrangements that would circumvent the ratemaking and supply goals of the statute." *Id.* at 526. Thus, in *Southland*, leaseholders were not permitted to cease the certificated interstate sale service and substitute a non-jurisdictional intrastate sale service without a public-interest determination by the Commission. *Id.* at 530-31. The principle of *Southland* is that changing a certificated jurisdictional service into a non-jurisdictional service constitutes an abandonment that must be first authorized under section 7(b). This principle applies equally to any certificated service without regard to the specific pipeline facilities being used. Section 7(b) applies with the same force to the abandonment or cessation of jurisdictional transportation services as it does to the abandonment (or cessation of operation of) jurisdictional facilities.

Here, Sea Robin had voluntarily submitted the entirety of its pipeline to FERC's jurisdiction for transportation certification, and it has long provided an integrated, receipt-to-delivery transportation service that was subject to regulation by FERC, including rate regulation. There is no question that the certificated service, which carried gas from offshore wells across state lines to the terminus of the system in Louisiana, is a jurisdictional transportation service, even if *arguendo* Sea Robin from the outset could have used some of its facilities to provide a distinct gathering service that would not otherwise have required certification. Cessation of jurisdictional service that had been provided for almost 30 years under NGA certificates must be in compliance with

section 7(b). The FERC impermissibly allowed Sea Robin to abandon the integrated receipt-to-delivery jurisdictional service without any of the safeguards of the public-interest hearing and decision required by the Act. Pet. App. 25a.

The court below held that there was no abandonment because Sea Robin would provide the same physical transportation (carriage across state lines) by the combination of separate jurisdictional and nonjurisdictional services. Pet. App. 25a. But this ruling places the D.C. Circuit in conflict with the Tenth Circuit, which has held that the Act's abandonment procedures must be followed if the natural gas company offers a different *jurisdictional* service, even if the same *physical* service of delivery of gas to an interstate customer is maintained. *Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466 (10th Cir. 1977). In *Phillips*, the jurisdictional service in question was an interstate sale of gas. Operating under a farmout agreement from Phillips, the Goldston Petroleum Company had sold gas from a leasehold to the United Gas Pipe Line Company for resale in other states. *Id.* at 467-68. Phillips exercised its rights under the farmout agreement to recover an undivided interest in the leasehold. Phillips then entered into a new contract with United that "expressly adopted all the terms and conditions of the earlier contract between Goldston and United, except as concerned the price to be paid." *Id.* Even though the same physical service of sale and delivery of gas to United would be performed, the Tenth Circuit ruled that Phillips could not offer a new jurisdictional service unless it secured authorization from the Commission to abandon the existing service. The Tenth Circuit held that because the Goldston "delivery was duly certified by the Commission" at the given price, it constituted a "'service' obligation in interstate commerce." *Id.* at 469. The court agreed with the Commission that "Phillips' subsequent attempt to sell the same gas to United at the higher rate constituted a reduction or abandonment of the prior dedication which could not be done

without first obtaining an abandonment authorization." *Id.* So, too, here Sea Robin could not terminate its tariffed, receipt-to-delivery transportation service in favor of an unbundled gathering service and a more limited transportation service without a Commission determination that such a change was in the public interest.

The Commission has frequently recognized that a reclassification of facilities as performing a "gathering" function does not obviate the statutory requirement of section 7(b). Indeed, the Commission invariably refuses to permit the transfer of previously certificated facilities reclassified as "gathering facilities" unless the pipeline can prove that abandonment of the certificated facilities is in the public interest. As the Commission has explained, "[a] certificate imposes on the recipient a service obligation and may not be ignored if the certificate holder later decides that under prevailing law or changed circumstances the facilities appear to be nonjurisdictional." *Freeport-McMoRan, Inc.* v. *KN Energy, Inc.*, 64 FERC ¶ 61,189, 62,567 (1993). Thus, prior to this case, the FERC did not vacate certificates upon a determination that a facility's primary function was gathering.

> Rather, because for each of the facilities which we have determined to be gathering, [the pipeline] applied for and accepted a certificate of public convenience and necessity under section 7(c) to construct and operate the facility, and used the facilities to render services which bundled together gathering and transmission, the latter being a jurisdictional service, abandonment authority is required.

Trunkline Gas Co., 67 FERC ¶ 61,256, 61,859 (1994) (noting that certificated service "created an expectation that the relationship between the pipeline and producers connected to its gathering systems would continue to be governed by regulation, not private contract"). Given that section 7(b) applies equally to the abandonment of "*facilities* subject to the jurisdiction of the Commission, *or any service* rendered

by means of such facilities," 15 U.S.C. § 717f(b) (emphasis added), the same principle would require a public-interest determination before authorizing the abandonment of jurisdictional service. The decision below that the abandonment provisions do not apply to reclassified gathering facilities, Pet. App. 25a, is an unjustifiable departure from settled precedent and Commission practice.[7] Notwithstanding the clear purpose of section 7(b) to protect reliance interests and to perfect the FERC's power to regulate jurisdictional rates and services, *Southland Royalty*, 436 U.S. at 529-30, the D.C. Circuit has impermissibly allowed a pipeline to terminate a regulated service without any finding that termination serves the public interest. This Court should not allow this unprecedented erosion of section 7(b).

III. THE SCOPE OF FERC JURISDICTION OVER OFFSHORE PIPELINES IS AN IMPORTANT ISSUE THAT REQUIRES IMMEDIATE REVIEW.

This case is of extraordinary importance to the production and transmission of natural gas on the OCS and must be reviewed. The OCS provides approximately 26.2 percent of U.S. natural gas production, with the vast majority of new

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[7] Perversely, the D.C. Circuit's approach deprives the FERC of the power to regulate the discontinuance of physical service over previously certificated facilities. A pipeline seeking to abandon some portion of its previously certificated facilities could simply obtain a gathering classification from the Commission without discontinuing physical service (thus, under the D.C. Circuit's rationale, precluding the need for abandonment), and then, anytime later, when its transportation contracts expired, simply discontinue physical service, again without obtaining abandonment-authorization. It could do this under the D.C. Circuit's theory because once the facility is declared to be nonjurisdictional gathering, the Commission loses its NGA authority to prohibit physical discontinuance of service. Thus, the decision below opens the door for significant segments of jurisdictional pipelines to escape jurisdiction without section 7(b) abandonment review simply by the pipeline's obtaining gathering status first and then later discontinuing physical service.

field discoveries occurring on the OCS in the Gulf of Mexico.[8] Literally billions of dollars of investment rely on the FERC's jurisdiction over these facilities.[9] Unfettered discretion by the FERC in reclassifying longstanding jurisdictional OCS facilities such as in this case threatens to introduce significant uncertainty into the OCS regulatory environment and to upset these reliance interests. As the FERC itself has recognized, regulatory uncertainty should be avoided with respect to OCS pipelines so as not to inhibit OCS exploration and development. "[T]he Commission recognizes that such projects are expensive, and would not be undertaken in an atmosphere of regulatory uncertainty. We do not want to employ a policy that might impede exploration and development of these new areas." *OCS Policy Statement*, 74 FERC ¶ 61,222, 61,756 (1996). The FERC has specifically acknowledged that producers and shippers on the Sea Robin system "have relied on [the FERC's] exercise of regulatory authority for more than 20 years as they made business plans and investments on the assumption that the regulatory regime would continue." *Sea Robin Pipeline Co.*, 71 FERC at 62,404.

Moreover, the only purpose for which pipelines like Sea Robin seek reclassification is to avoid rate regulation. The FERC has recognized that a reclassified OCS gathering facility has the power to charge monopoly rates that will frustrate FERC's regulation of interstate transportation. *Shell Offshore, Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 100

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[8] *See Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, 64 Fed. Reg. 37,718, 37,719 (proposed July 13, 1999).

[9] In just one offshore area, the Garden Banks Area, FERC recognized that approximately $1.7 billion was being spent by producers on initial development. *See Shell Gas Pipeline Co.*, 74 FERC ¶ 61,277, 61,892-93 (1996). The cost of deep water exploration and production is considerably greater than the cost of shallower exploration and production. *Gas Pipeline Facilities & Servs.*, 74 FERC ¶ 61,222, 61,757 (1996) ("*OCS Policy Statement*").

FERC ¶ 61,254, 61,912 (2002). The FERC has also acknowledged that gouging producers will distort price signals and ultimately harm consumers: "The public would thereby suffer from the reduced competition in the interstate transportation and sale of natural gas. Further, these distortions of production and development decisions could also have a negative economic impact." *Id.* at 61,914. The Commission reasserted rate jurisdiction in the *Shell* case because the pipeline had spun down its gathering facilities to an affiliate and had acted in concert with that affiliate so as to abuse their market power and frustrate the Commission's regulation of transportation rates, *id.* at 61,912-14. But other pipelines will inevitably conduct spin-offs to unaffiliated carriers or devise other arrangements to avoid Commission jurisdiction. Producers will be forced to pay monopoly rents, with the consumer being the ultimate victim. *Sea Robin Pipeline Co.*, 75 FERC ¶ 61,332, 62,084 (1996) (recognizing "Sea Robin's market power in the event that Sea Robin prevailed in its pursuit of nonjurisdictional status").[10]

The situation is particularly grave on the OCS, as the FERC has acknowledged. Onshore, if an owner of gathering facilities engaged in monopolistic conduct, state regulators could step in, but those regulators have no authority on the OCS. *Sea Robin Pipeline Co.*, 71 FERC at 62,404. The majority dismissed this point with the contention that the need for regulation cannot confer jurisdiction that Congress has withheld. Pet. App. 24a. But in its subsequent enactments governing the OCS, Congress properly assumed that the OCS pipeline grid would be subject to FERC rate regulation

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[10] As the FERC itself pointed out in its original Sea Robin order, "the economic consequences of the refunctionalization of all OCS transportation lines could result in a regulatory transfer of billions of dollars from ratepayers and producers to OCS pipelines which own and operate already heavily depreciated jurisdictional transportation facilities." *Sea Robin Pipeline Co.*, 71 FERC at 62,391 (referencing assertions by Indicated Parties.)

because this Court had held that "[e]xceptions to the primary grant of jurisdiction ... are to be strictly construed," *Interstate Natural Gas Co.*, 331 U.S. at 690-91, and in particular that the "'production' and 'gathering'" exemption was narrow, *Northern Natural*, 372 U.S. at 90. See *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-98 (1979) (Congress is presumed aware of the state of the law in passing new legislation). That assumption was certainly justified because FERC has historically exercised widespread NGA jurisdiction over OCS pipelines. There would be no room for substantial monopoly power if the court below had been faithful to this Court's precedents.

Given the great advantage for pipelines of escaping FERC rate regulation, other OCS reclassification cases similar to Sea Robin have been or will be brought at FERC as well as in the D.C. Circuit, and FERC has held that the *Sea Robin* decision will govern its determinations.[11] This issue is thus a recurring one and its resolution should not be left in the hands of a badly divided court of appeals. Nor should this Court tolerate a circumstance where litigants seeking review of a FERC jurisdictional order shop among courts of appeals depending on whether the appellate court recognizes the strict-construction rule. This Court should grant certiorari and avert the disruption that will occur in this industry if the arbitrary reclassification of OCS pipelines goes unchecked.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

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[11] *See, e.g., Enron Gulf Coast Gathering Ltd. P'ship*, 95 FERC ¶ 61,318 (2001) (applying *Sea Robin* to reverse jurisdictional decision and find part of offshore pipeline to be gathering facilities); *Transcontinental Gas Pipe Line Corp.*, 97 FERC ¶ 61,298 (2001). *See also Williams Gas Processing-Gulf Coast Co.* v. *FERC*, Nos. 01-1327, et al. (D.C. Cir. filed July 26, 2001); *Newfield Exploration Co.* v. *FERC*, Nos. 02-1014, et al. (D.C. Cir., filed Jan. 8, 2002).

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February 14, 2003

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1355, 00-1357, 00-1361, 00-1363 through 00-1365.

EXXONMOBIL GAS MARKETING COMPANY,
a Division of Exxon Mobil Corporation,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ANR PIPELINE COMPANY, et al.,
Intervenors.

Argued Feb. 1, 2002.
Decided Aug. 6, 2002.

Before: GINSBURG, Chief Judge, EDWARDS and SENTELLE, Circuit Judges.

SENTELLE, Circuit Judge:

ExxonMobil Gas Marketing Company, *et al.*,[1] (hereinafter "ExxonMobil") and the Producer Coalition[2] petition for review of Federal Energy Regulatory Commission ("FERC"

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[1] Joining ExxonMobil Gas Marketing Co.'s brief are: Amerada Hess Corp., Amoco Production Co., BP Energy Co., Anadarko Petroleum Corp., Marathon Oil Co., Murphy Exploration and Production Co., Phillips Petroleum Co., and Texaco Natural Gas, Inc.

[2] The Producer Coalition consists of Forest Oil Corp., the Houston Exploration Co., Newfield Exploration Co., Ocean Energy, Inc., Dominion Exploration & Production, Inc., and TotalFinaElf E&P U.S.A., Inc. Intervenor Independent Petroleum Association of America joins the Producer Coalition's brief.

or "the Commission") orders in which FERC reclassified portions of Sea Robin Pipeline Company's pipeline system on the Outer Continental Shelf as non-jurisdictional "gathering" facilities for natural gas, rather than jurisdictional "transportation" facilities, pursuant to section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b). FERC argues that in developing and applying its reformulated "primary function" test the Commission followed the suggestion of the United States Court of Appeals for the Fifth Circuit in *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir.1997) ("*Sea Robin I*"), and reasonably identified the demarcation point between gathering and transportation in Sea Robin's pipeline system. Because the Commission did not act unreasonably in determining that portions of Sea Robin's system were non-jurisdictional, we deny the petitions for review.

I. Background

A. Statutory and Regulatory Framework

Section 1(b) of the Natural Gas Act ("the Act"), 15 U.S.C. § 717 *et seq.*, governs "the transportation of natural gas in interstate commerce." 15 U.S.C. § 717(b). However, in section 1(b) of the Act Congress prescribed not only "the intended reach of the Commission's power, but also specified the areas into which this power was *not* to extend." *Federal Power Comm'n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 503, 69 S.Ct. 1251, 1255, 93 L.Ed. 1499 (1949) (emphasis added). Section 1(b) expressly exempts from the Commission's jurisdiction "the production or gathering of natural gas." 15 U.S.C. § 717(b). Thus, Congress "carefully divided," *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 510, 109 S.Ct. 1262, 1274, 103 L.Ed.2d 509 (1989), energy regulatory authority and "did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act." *Panhandle Eastern*, 337 U.S. at 502-03, 69 S.Ct. at 1255.

The Natural Gas Act does not define either "transportation," which falls within the Commission's jurisdiction, or "gathering," which is exempt from FERC authority under the Act. The Supreme Court has, however, held that "[e]xceptions to the primary grant of jurisdiction in the section are to be strictly construed." *Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 690-91, 67 S.Ct. 1482, 1487, 91 L.Ed. 1742 (1947) (construing 15 U.S.C. § 717(b)). Thus, the Supreme Court has "consistently held that 'production' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90, 83 S.Ct. 646, 649-50, 9 L.Ed.2d 601 (1963). The Commission's long-held definition of gathering, taken as consistent with the Supreme Court's pronouncements on the Act, is "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line." *Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957); *see also Conoco Inc. v. FERC*, 90 F.3d 536, 539 n. 2 (D.C.Cir.1996) ("Gathering is the process of taking natural gas from the wells and moving it to a collection point for further movement through a pipeline's principal transmission system.") (citing *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n. 1 (10th Cir.1990)).

Despite these attempts to clarify the Natural Gas Act, this Court has observed that "[t]he line between jurisdictional transportation and nonjurisdictional gathering is not always clear." *Conoco*, 90 F.3d at 542. For many years the Commission employed two principal tests to differentiate transportation from gathering. Developed in the on-shore context, these tests were the "behind-the-plant" test and the "central-point-in-the-field" test. The "behind-the-plant" test presumes that all facilities located between the wellhead and a processing plant are non-jurisdictional gathering lines, while facilities downstream of the processing plant are

presumptively transportation facilities. *See Phillips Petroleum Co.*, 10 F.P.C. 246, 276-78, 1951 WL 1832 (1951), *rev'd on other grounds*, *Wisconsin v. Federal Power Comm'n*, 205 F.2d 706 (D.C.Cir.1953), *aff'd*, *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954). For gas that requires no processing the "central-point-in-the-field" test applied, under which lateral lines collecting gas from separate wells that then converge into a single larger line (typically at the point where the gas is compressed for transportation by the pipeline), were classified as gathering facilities. *E.g., Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957). Since 1983, the Commission has subsumed these two tests into its "primary function" test to determine "whether a facility is devoted to the collection of gas from wells—gathering—or to the further ('downstream') long-distance movement of gas after it has been collected—interstate transportation." *Conoco*, 90 F.3d at 543 (citing *Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,063, at 61,143, 1983 WL 39391 (1983); *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,987-88, 1990 WL 1241336 (1990)).

The "primary function" test generally employs the following six physical criteria: (1) the length and diameters of the lines; (2) the extension of the facility beyond the central point in the field; (3) the geographic configuration of the facility; (4) the location of compressors and processing plants; (5) the location of wells along all or part of the line facility; and (6) the operating pressure of the lines. *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1196 (D.C.Cir.2000). In addition, FERC considers the following "non-physical" criteria: (1) the purpose, location and operation of the facility; (2) the general business activity of the owner of the facility; (3) whether a jurisdictional determination, i.e., gathering versus transmission, is consistent with the objectives of the Natural Gas Act and other legislation; and (4) the changing technical and geographic nature of exploration and production activities. *Id.* No one factor is determinative in the primary

function test, and not all factors apply in all situations. *See Williams Field Servs. Group, Inc. v. FERC*, 194 F.3d 110, 116 (D.C.Cir.1999); *Conoco*, 90 F.3d at 543. The Commission "gives consideration to all of the facts and circumstances of the case rather than mechanically applying a facilities configuration standard." *West Tex. Gathering Co.*, 45 F.E.R.C. ¶ 61,386, at 62,219 n.4, 1988 WL 246728 (1988); *see also Conoco*, 90 F.3d at 543.

When these physical factors were developed, most jurisdictional questions involved onshore facilities. As an increasing number of facilities have been constructed offshore on the Outer Continental Shelf ("OCS"), where the pattern of gathering and distribution differs, the applicability of the factors has been questioned. *See, e.g., EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir.1989). Specifically, it is often not feasible to process raw gas on open water. As a result, pipelines on the OCS typically do not gather gas at a local, centralized point within a field as they would onshore, to prepare it for traditional transportation. Rather, on the OCS, relatively long lines are constructed to carry the raw gas from offshore platforms, where "[o]nly the most rudimentary separation and dehydration operations" are conducted, *EP Operating*, 876 F.2d at 47, to the shore or a point closer to shore, where it can be processed into "pipeline quality" gas. *Id.* at 48. In *EP Operating Co.*, the Fifth Circuit discounted FERC's ruling that the offshore platform where initial gas treatment took place constituted a "central point in the field" where the gathering function was complete, and reversed FERC's decision that the 51-mile long, 16-inch diameter OCS pipeline downstream of that platform was a jurisdictional transportation facility. *See id.* at 49. Following *EP Operating Co.*, FERC noted that "because of recent advances in engineering and available technology, offshore drilling operations continue to move further offshore and further from existing interstate pipeline interconnections" and therefore the Commission would

assess "the continuing viability and relevance of the 'primary function' test to current industry conditions." *Amerada Hess*, 52 F.E.R.C. at 61,988. FERC then modified its primary function test to apply a sliding scale, "allow[ing for] the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area," *id.* at 61,988, and to consider the "non-physical" criteria described above. This "modified" primary function test was applied by FERC when Sea Robin petitioned in 1995 for a declaration that its facilities perform a gathering function, rather than transportation, thus entitling Sea Robin to exemption from the Commission's jurisdiction under section 1(b) of the Act.

B. Sea Robin's Pipeline System[3]

Sea Robin's pipeline system is located entirely offshore in the Gulf of Mexico and approximately 90 percent of its facilities lie in water depths of less than 140 feet. It is one of numerous competing pipeline systems located in the Gulf. The Sea Robin system is configured roughly in the form of an inverted "Y" with two arteries stretching roughly southwest and southeast from a central point about fifty miles south of the Louisiana coast. These two pipelines collect raw gas from sixty-seven offshore production platforms. Sea Robin's Vermilion 149 Compressor Station stands at the intersection of these two pipelines. It compresses the gas from the sixty-seven platforms for travel north, up the inclined seabed, to the Erath Compressor Station on the mainland. After collecting gas from four more platforms, the system terminates near Erath, Louisiana, where the gas is separated, dehydrated and processed. The Erath Compressor Station then prepares the gas for delivery to downstream transmission pipelines at five nearby entry points.

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[3] This discussion is largely taken from *Sea Robin I*, 127 F.3d at 367-68. *See also Sea Robin Pipeline Co.*, 87 F.E.R.C. ¶ 61,384, at 62,430, 1999 WL 444654 (1999).

The Sea Robin system consists of 438 miles of dual-phase pipelines with a capacity to transport 1.26 billion cubic feet of gas per day (Bcf/day) and includes around 69,500 horsepower (hp) of compression. The pipeline is "dual-phase" in that it carries a raw stream of unpurified natural gas and liquid hydrocarbons taken directly from the gas wells. The total compression horsepower at the Vermilion 149 Station is 37,050 hp and is 32,490 hp at Erath, Louisiana. Of the 438 miles of pipes, 339 miles are larger than twenty inches in diameter. The remaining ninety-nine miles of pipes, mostly running from individual platforms to the larger pipes, are between four and sixteen inches in diameter.

Along the two arms of the inverted "Y," which extend out in the Outer Continental Shelf, 45 lateral lines with diameters ranging from 4.5 to 30 inches are connected to 67 receipt points located on production platforms, or at subsea taps where Sea Robin's facilities intersect with short lateral lines of producers or pipelines. Through these upstream arms, Sea Robin moves the raw gas to the Vermilion 149 Station at the fork of the "Y," a manned platform with two turbine compressor units of 12,350 horsepower each. From there, the gas moves along the Vermilion 149-Erath segment. That segment is the longest portion of the pipeline, consisting of 66.3 miles of 36-inch diameter pipeline running in a straight line from Sea Robin's Vermilion compressor station to onshore processing facilities. Gas from four additional platforms is mingled with the gas traveling the Vermilion 149-Erath segment. The four platforms along this section are within twenty-five miles of the Vermilion compressor station, which means that the last forty-one miles of the thirty-six inch diameter pipeline are uninterrupted by lateral pipe segments. The gas and liquefiables delivered by Sea Robin meet the merchantable natural gas quality standards of downstream transmission pipelines.

FERC issued the original certificate for the Sea Robin system in 1969, pursuant to section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), authorizing the system to both sell and transport gas from the Outer Continental Shelf. *Sea Robin Pipeline Co.*, 41 F.P.C. 257, 1969 WL 5152 (1969). In later years the Commission certificated extensions of the Sea Robin system farther out on the OCS. *See Sea Robin Pipeline Co.*, 87 F.E.R.C. at 62,429 n. 26. Subsequently, Sea Robin became a transportation-only pipeline, and its shippers today consist of producers and marketers that transport gas onshore for ultimate delivery to markets on connecting interstate pipelines. *Id.* at 62,428.

C. Prior Proceedings

In 1995, the Sea Robin Pipeline Company petitioned FERC for a declaration that its facilities perform a "gathering" function, rather than "transportation," and are thus not subject to the Commission's jurisdiction under section 1(b) of the Natural Gas Act. *See Sea Robin I*, 127 F.3d at 367. FERC denied Sea Robin's petition, determining that its pipelines were engaged in jurisdictional transportation activities. *See id.*; *Sea Robin Pipeline Co.*, 71 F.E.R.C. ¶ 61,351, 1995 WL 361806 (1995), *order denying reh'g*, 75 F.E.R.C. ¶ 61,332, 1996 WL 355518 (1996). In reaching its conclusion, FERC emphasized the "*very large size* of [Sea Robin's] system." *Sea Robin Pipeline Co.*, 71 F.E.R.C. at 62,398 (emphasis in original). According to the Commission, "the length and diameter of the system's components, as well as its overall size, [we]re not outweighed by other elements of the 'primary function' test." *Id.* Further, FERC "repeatedly emphasized that the non-physical criteria in its test supported its conclusion that Sea Robin was a transporter, particularly Sea Robin's prior certification as a jurisdictional pipeline and its ownership by an interstate pipeline." *Sea Robin I*, 127 F.3d at 369-70. Sea Robin petitioned for review of FERC's order in the U.S. Court of

Appeals for the Fifth Circuit. The Fifth Circuit granted that petition for review, vacated the order, and remanded to the Commission. *Sea Robin I*, 127 F.3d at 372.

Specifically, the Fifth Circuit questioned FERC's reliance on the size of Sea Robin's system as "presumptively" determinative, as well as the apparent abandonment, without reasoned consideration, of the "sliding scale" approach announced by the Commission in *Amerada Hess*, 52 F.E.R.C. ¶ 61,268 (1990). *See Sea Robin I*, 127 F.3d at 370. The Fifth Circuit concluded that FERC had "reverted to its single factor, bright-line approaches that it had previously rejected as unworkable for offshore pipelines." *Id.* (citing *Northwest Pipeline Corp.*, 905 F.2d at 1409; *EP Operating Co.*, 876 F.2d at 48). The Court also faulted the Commission for the reliance it placed on non-physical considerations, such as Sea Robin's ownership and shipper expectations. *See* 127 F.3d at 370-71 ("If the Commission is to remain tethered to the statute, as it must, that inquiry must be based primarily on physical criteria and the realities of the field."). The Fifth Circuit "intend[ed] that [non-physical criteria] be put in its place as considerations secondary to the physical factors." *Id.* at 371. Finally, the Fifth Circuit found FERC's "regulatory gap" argument, that a regulatory gap might arise if Sea Robin was held to be a gathering system, wanting: "Need for regulation cannot alone create authority to regulate." *Id.*

In remanding to the Commission, the Fifth Circuit acknowledged that "Sea Robin's system resists easy categorization because the logistics of offshore pipelines obscures differences between gathering gas from Gulf platforms and transporting it to the mainland." *Sea Robin I*, 127 F.3d at 370. It also observed that "the pattern of gathering and distribution on shore differs from the pattern of transportation and gathering of gas from the middle of the Gulf to the mainland," *id.*, and suggested that FERC "again

consider the applicability of the primary function test to offshore pipeline systems and if necessary, reformulate this test." *Id.* at 367. The Court noted that on remand, "Sea Robin may choose to respond to the Commission's invitation to offer portions of its system as predominantly involved in a gathering or a transportation function." *Id.* at 371 (footnote omitted). In doing so, the Court specifically admonished the Commission that "[d]iscomfort in drawing the jurisdictional line at points internal to an overall system may be soothed with the reminder that Congress did not intend to extend FERC's jurisdiction to all natural gas pipelines; indeed it demands the drawing of jurisdictional lines, even when the end of gathering is not easily located." *Id.* The Court opined that the Commission could "consider, for example, a distinction between the field south of the Vermilion Compressor Station and the pipelines leading north to Erath, Louisiana." *Id.*

On remand, FERC accepted the Fifth Circuit's invitation to reformulate its primary function test. *Sea Robin Pipeline Co.*, 87 F.E.R.C. ¶ 61,384, 1999 WL 444654 (1999) ("*Remand Order*"). In reformulating its primary function test, the Commission concluded that the "behind-the-plant" factor is not necessarily determinative of where gathering ends when applied to offshore facilities. *See id.* at 62,425. Further, FERC determined that it would "assess the physical configuration of offshore pipeline systems to determine if there exists a central location where gas is aggregated for further transportation to shore." *Id.* Such a location would be the "offshore analogue of the onshore 'central-point-in-the-field' criterion." *Id.* In cases where a pipeline system is configured to deliver gas collected from upstream wells to a centralized location through several relatively small diameter lines for further delivery onshore through a single larger diameter pipeline, that centralized aggregation location is considered by FERC to be analogous to the central-point-in-the-field factor and "given weight in identifying the

demarcation point between gathering and transportation on OCS pipeline systems." *Id.* at 62,426. Thus, the Commission was willing to consider, as suggested by the Fifth Circuit, that the demarcation point between gathering and transmission on a system like Sea Robin's could be determined to be at a point internal to an overall pipeline system. *See Sea Robin Pipeline Co.*, 92 F.E.R.C. ¶ 61,072, at 61,285 (2000) ("*Rehearing Order*").

Applying its reformulated primary function test, the Commission concluded that Sea Robin's pipeline facilities comprise two distinct components: a jurisdictional transportation system from the Vermilion 149 Station to Erath, and a non-jurisdictional gathering system upstream of the Vermilion 149 Station. *See Remand Order*, 87 F.E.R.C. at 62,426. FERC found that the primary function of the Vermilion-Erath line "is to transport to shore natural gas that has been delivered from many areas through a network-like configuration of relatively smaller diameter lines to a centralized point where gas is aggregated and compressed," namely the Vermilion 149 Station. *Id.* at 62,432.

In support of its decision to draw the jurisdictional line at the Vermilion 149 Compressor Station, the Commission emphasized certain key aspects of the system's overall physical configuration. Specifically, FERC found that the "straight-shot" geographical configuration of Sea Robin's system downstream of the Vermilion 149 Station, interconnecting with only two laterals delivering gas from only four wells along its 66.3-mile length, and the line's large 36-inch diameter are indicative of transportation. *See id.* at 62,430. In contrast, the facilities upstream of the Vermilion 149 Station interconnect with 45 laterals connected to 67 production platforms, and the lines are 30 inches or less in diameter. *See id.* at 62,431. Moreover, FERC found that the compression that occurs at Vermilion 149 "is typical of compression found on large diameter transportation lines

transporting high volumes of gas over relatively long distances," rather than "field compression" associated with production. *Id.* at 62,430. According to FERC, the Vermilion 149 Station thus represented a central aggregation location highly suggestive of the demarcation point between gathering and transportation. *See id.* at 62,431. The Commission concluded that in the "most fundamental meaning of the 'primary function' test, the 'totality of the circumstances' demonstrates that the primary function of the Vermilion-Erath Line is to transport to shore natural gas that has been delivered from many areas through a network-like configuration of relatively smaller diameter lines to a centralized point where the gas is aggregated and compressed," and these smaller lines upstream of Vermilion 149 are engaged in non-jurisdictional gathering. *Id.* at 62,432.

On rehearing, the Commission adhered to its position. *See Rehearing Order,* 92 F.E.R.C. at 61,284. FERC reiterated that its reformulated primary function test included: (1) consideration of an additional analytical element applicable where OCS pipeline facilities exhibit a "centralized aggregation point"; (2) adjustment in the weight to be afforded the behind-the-plant criterion on the OCS; and (3) a primary focus on physical factors. *Id.* at 61,285. It addressed arguments from the petitioners that all of Sea Robin's system was engaged in jurisdictional transportation, and arguments from Sea Robin that its system was engaged entirely in non-jurisdictional gathering.[4] Specifically the *Rehearing Order* identifies 13 physical factors considered in concluding that

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[4] Sea Robin no longer challenges FERC's *Remand Order* and supports the Commission's decision to draw the line between jurisdictional transportation and non-jurisdictional gathering at the Vermilion 149 Station.

the facilities upstream of the Vermilion 149 Station are engaged in non-jurisdictional gathering. *See id.* at 61,291. These physical factors are:

(1) the 66.3 mile length of the Vermillion-Erath line;

(2) the 36-inch diameter of the Vermillion-Erath line;

(3) the straight-line configuration of the Vermillion-Erath line;

(4) the inverted-Y configuration of the Sea Robin System;

(5) the existence of only four platforms along the length of the Vermillion-Erath line as compared to the connections to 71 production platforms upstream of the Vermillion 149 Compressor Station;

(6) the abrupt change in physical attributes and configuration in the system occurring at the Vermillion 149 Compressor Station;

(7) the concentration of compression at the Vermillion 149 Compressor Station;

(8) the existence of a centralized aggregation location at the Vermillion 149 Compressor Station;

(9) the 4.5 to 24 inch diameters of the lines upstream of the Vermillion 149 Compressor Station;

(10) the existence of 45 laterals feeding into the two upstream arms of the inverted-Y upstream of the Vermillion 149 Compressor station;

(11) the presence of 71 production platforms connected to the system upstream of the Vermillion 149 Compressor station;

(12) the network configuration of Sea Robin's facilities upstream of the Vermillion 149 Compressor Station; and

(13) the onshore location of processing plants, which was not considered a determinative factor due to the geographic and technical characteristic of production and transportation offshore.

Id. Further, FERC rejected the argument that it had substituted the new "centralized aggregation point" criteria for its prior impermissible reliance on a single-factor test. Rather, it explained, "the centralized-aggregation-point is more appropriately viewed as a descriptive label for a set of a number of individual physical characteristics." *Id.* "Just as the historical behind-the-plant and central-point-in-the-field factors are based on the existence of a confluence of individual elements, the new centralized-aggregation-point factor also is an example of an additional physical factor that can arise as the result of the combination of several individual physical components. . . ." *Id.* at 61,292. Relying on the Fifth Circuit's *Sea Robin I* decision, the Commission rejected the suggestion that various production platforms, rather than the Vermilion 149 Station, are centralized aggregation points. *See id.*

Similarly, the Commission relied on the Fifth Circuit's decision to reject the suggestion that the reformulated primary function test would create an unlawful "regulatory gap" on the Outer Continental Shelf. *See id.* at 61,293 (citing *Sea Robin I*, 127 F.3d at 371). Moreover, FERC claimed to have addressed such "regulatory gap" concerns in its separate decision to promulgate regulations under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, to ensure that natural gas is transported in an open and nondiscriminatory manner. *Rehearing Order*, 92 F.E.R.C. at 61,293 (citing 65 Fed.Reg. 20,354 (Apr. 17, 2000)).

FERC also addressed arguments that it had given inadequate attention to the impact of the jurisdictional determination on the settled expectations of customers and on new upstream deepwater systems. The Commission found that

the "remanding Court's directions on this point were clear. The Court ruled that while the practical effect of the determination of gathering is relevant, the primary consideration in formulating a jurisdictional test must be the physical characteristics that distinguish gathering from transmission." *Id.* at 61,293-94 (citing *Sea Robin I*, 127 F.3d at 371). Thus, although FERC considered these non-physical factors, the primary focus, as required by the Fifth Circuit, had to be the physical factors, and those factors supported drawing the jurisdictional line at the Vermilion 149 Station. *See id.* at 61,294.

Finally, FERC considered and rejected arguments that: (1) a 1978 amendment to OCSLA purportedly equated the scope of the "gathering" exemption in the Natural Gas Act with the concept of "feeder lines," *see id.*; (2) certificates issued to Sea Robin for the reclassified non-jurisdictional facilities must be subject to "abandonment" proceedings pursuant to section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), *see id.* at 61,294-95; and (3) the fact that a jurisdictional upstream pipeline (the Garden Banks pipeline) delivers gas into the east leg of Sea Robin's system upstream of the Vermilion 149 Station prevents the Commission from reclassifying the Sea Robin system as non-jurisdictional. *See id.* at 61,295. On this last issue, petitioners contended that FERC had violated its prior ruling in *Tarpon Transmission Co.*, 60 F.E.R.C. ¶ 61,041, 1992 WL 166429 (1992), which they read as precluding pipeline facilities that carry gas delivered by a jurisdictional transportation pipeline from being classified as gathering facilities. FERC noted that this issue was raised for the first time on rehearing; however, the Commission went on to hold that the petitioners' reliance on *Tarpon* was misplaced. *See Rehearing Order*, 92 F.E.R.C. at 61,295. Although the presence of upstream transportation facilities was one factor considered in *Tarpon*, the real concern in that proceeding was that finding Tarpon's facilities to be engaged in non-jurisdictional gathering would

have left shippers and producers unprotected from the exercise of monopoly power. *See id.* FERC concluded that such concerns were no longer relevant for facilities exempt from the Natural Gas Act because of the Commission's new OCSLA anti-discrimination regulations. *Id.* at 61,295-96.

ExxonMobil and the Producer Coalition filed timely petitions for review challenging the *Remand Order* and the *Rehearing Order* in this Court.

II. Analysis

The challenged orders are subject to reversal if the FERC's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In making this determination, "[t]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971); *see Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983). To the extent that the petitioners are challenging FERC's interpretation of section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), we apply the two-step approach of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). When Congress has spoken, we are bound by that pronouncement and that ends this Court's inquiry. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82 (*Chevron* step one). Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. at 2782 (footnote omitted) (*Chevron* step two).

In reviewing the Commission's determinations, we are mindful that "[t]he line between jurisdictional transportation and non-jurisdictional gathering is not always clear." *Conoco*, 90 F.3d at 542. The jurisdictional determination under section 1(b) of the Act is "a line-drawing problem for which there is no easy answer." *Williams Field Servs.*, 194 F.3d at 118. Thus, "it is not this court's role to interpose its judgment." *Id.* Rather, we are mindful that in "evaluating and balancing the several factors under the primary function test, the Commission brings to bear its considerable expertise about the natural gas industry." *Conoco*, 90 F.3d at 544; *see also Lomak*, 206 F.3d at 1196-97; *Williams Field Servs.*, 194 F.3d at 118. "Accordingly, we will uphold the Commission's application of the test as long as it gives 'reasoned consideration to each of the pertinent factors' and articulates factual conclusions that are supported by substantial evidence in the record." *Lomak*, 206 F.3d at 1197 (quoting *Conoco*, 90 F.3d at 544); *see* 15 U.S.C. § 717r(b) ("The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."). The burden is on the petitioners to show that the Commission's choices are unreasonable and its chosen line of demarcation is not within a "'zone of reasonableness'" as distinct from the question of whether the line drawn by the Commission is "precisely right." *Hercules Inc. v. EPA*, 598 F.2d 91, 107 (D.C.Cir.1978) (quoting *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 278, 96 S.Ct. 1999, 2004, 48 L.Ed.2d 626 (1976)). We cannot say that the Commission acted unreasonably either in interpreting the Natural Gas Act or declining to exercise jurisdiction over portions of Sea Robin's system. Therefore petitioners have failed to carry their burden, and the petitions must be denied.

A.

ExxonMobil challenges FERC's determination that the Vermilion 149 Station is a reasonable point at which the Commission may draw the line between non-jurisdictional

gathering and jurisdictional transportation. It contends that the added compression at Vermilion 149 only serves to push and pull gas along an "integrated" transportation system. Petitioner proposes that the individual production platforms mark the point at which gathering ends and transportation begins. However, petitioner's differing interpretation of the physical factors present on the Sea Robin system does not provide us with a basis to upset the Commission's order. Reasonable people may disagree as to where gathering ends and transportation begins. Were we the Federal Energy Regulatory Commission, we might draw the line at Erath. Others might draw it at the production platforms themselves. *But see EP Operating Co.*, 876 F.2d at 49. But after considering the inherent ambiguity in the statute and the fact that "[t]he line between jurisdictional transportation and non-jurisdictional gathering is not always clear," *Conoco*, 90 F.3d at 542, (as it is not clear here) we simply cannot conclude that the Commission's choice of the Vermilion 149 Station as the dividing line was unreasonable, especially in light of the Fifth Circuit's decision on remand. *See Sea Robin I*, 127 F.3d at 371. We therefore hold that the Commission's choice, if not unassailable, is at least defensible, and survives the arbitrary-and-capricious review of the Administrative Procedure Act.

FERC relied on the smaller dimensions of the upstream lines in contrast to the 36-inch Vermilion-Erath line; the 45 laterals feeding into the two upstream arms; the 67 production platforms connected to the upstream facilities compared with only four downstream; the network configuration of the upstream facilities; and the need for added compression at the Vermilion 149 Station to move gas to shore. *See Rehearing Order*, 92 F.E.R.C. at 61,291-92. All of these physical factors show a meaningful distinction between the facilities upstream and downstream of Vermilion 149 and make it reasonable to define it as the central aggregation point. Obedient to the Fifth Circuit's suggestion, FERC

examined Sea Robin's system in parts, rather than as a whole, and reasonably concluded that different parts of the system required different jurisdictional treatment. Moreover, as described by the Commission, the central aggregation test is not a new, bright-line test, but rather is an amalgamation of physical factors, and in any event, is wholly consistent with past FERC precedent. It has long been the Commission's view, upheld by this Court, among others, that when gas from separate wells is collected by several lines which converge at a single location in the producing field for delivery into a single line for transportation, the separate lateral lines behind the central point are classified as non-jurisdictional gathering facilities. *Accord Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957). That aptly describes the Sea Robin system. At Vermilion 149 gas from several lateral lines is brought together and propelled to shore. The dissent is critical of FERC's determination because in its view, "[s]urely a 'fork in the road' cannot be the demarcation line between unregulated production/gathering and regulated transportation." Dis. Op. at 5. But why not? Cannot two roads diverging (or in this case, converging) make all the difference? Indeed, has that not always been the thrust of the Commission's "central-point-in-the-field" test? In this case, the forks of the "Y" gathered gas from production platforms at 67 receipt points, whereas the straight segment received gas at only four such points; the forks were pipes of smaller diameter than that of the straight segment; and the forks required less compression to move the gas along. Moreover, the line between gathering and transportation is inherently elusive, *see, e.g., Conoco*, 90 F.3d at 542, and FERC "has wide discretion to determine where to draw administrative lines." *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C.Cir.2000). It is for the Commission, in the first instance, to determine the patterns of gathering and transportation in the offshore context. "We are generally 'unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn

. . . are patently unreasonable, having no relationship to the underlying regulatory problem.'" *Cassell v. FCC,* 154 F.3d 478, 485 (D.C.Cir.1998) (quoting *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 60 (D.C.Cir.1977)). We conclude that petitioner has failed to carry its burden.

ExxonMobil makes much of the Supreme Court's language in *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas,* 372 U.S. 84, 90, 83 S.Ct. 646, 649-50, 9 L.Ed.2d 601 (1963), in which the Court held that "'production' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." Thus, petitioner essentially contends that given the length and size of the upstream portion of Sea Robin's system, it cannot possibly be involved in gathering, as described by the Supreme Court. However, the Fifth Circuit expressly rejected FERC's *per se* reliance on length of a pipeline, holding that a 51-mile pipeline was non-jurisdictional. *EP Operating Co.*, 876 F.2d at 49. This same decision weighs against FERC's treating the production platforms as central aggregation points as well. *See id.* Rather, the Fifth Circuit required the Commission to recognize that "the pattern of gathering and distribution on shore differs from the pattern of transportation and gathering of gas from the middle of the Gulf to the mainland." *Sea Robin I,* 127 F.3d at 370; *see also Amerada Hess,* 52 F.E.R.C. at 61,988 (adopting the "modified primary function test" in response to *EP Operating Co.*, and in recognition of the "changing technical and geographic nature of exploration and production"). Given these different physical realities, what might not seem "narrowly confined" in the on-shore context, may well be on the Outer Continental Shelf. *Cf. West v. Gibson,* 527 U.S. 212, 218, 119 S.Ct. 1906, 1910, 144 L.Ed.2d 196 (1999) ("Words in statutes can enlarge or contract their scope as other changes, in the law or in the world, require their application."); *Oncale v. Sundowner*

Offshore Servs., Inc., 523 U.S. 75, 79, 118 S.Ct. 998, 1002, 140 L.Ed.2d 201 (1998) (statutory provisions often go beyond "the principal evil Congress was concerned with"). Given this backdrop, we cannot conclude that FERC's determination is unreasonable here.

Moreover, we have previously recognized the limited reach of the Supreme Court's holding in *Northern Natural*. In each case in which the Supreme Court "has applied this narrow definition of 'production' and 'gathering' to uphold the Commission's jurisdiction, the regulated entity was engaged in a jurisdictional activity." *Conoco*, 90 F.3d at 545. Thus, "when a natural gas company provided *bundled sales* and interstate transportation from its own wells to consumers and distributors, the Commission could properly include the company's production and gathering costs in its rate base for the *bundled service*." *Id.* We found that it was in the "context" of *bundled* jurisdictional and non-jurisdictional activities that "the Court defined 'gathering' narrowly, as limited to activities preceding sales for resale." *Id.* at 546 (citing *Phillips Petroleum*, 347 U.S. at 678, 74 S.Ct. at 796-97). But we now live in an unbundled world. *See id.* at 539-40 (observing that in Order No. 636, FERC "mandat[ed] the unbundling of gas sales and interstate transportation . . . in order to give pipeline customers unimpeded access to the competitive wellhead market and to permit all gas sellers to compete on an equal basis"). Sea Robin is no longer involved in the sales of gas from the OCS—it is now strictly a transportation system. *Remand Order*, 87 F.E.R.C. at 62,428. Therefore the Supreme Court's restrictive definition of "gathering," while clearly relevant, must be considered in context. In the context of unbundled, off-shore pipeline systems, "the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution," *Northern Natural Gas*, 372 U.S. at 90, 83 S.Ct. at 650, cannot be as

narrowly construed as on-shore. *Accord Sea Robin I*, 127 F.3d at 370; *EP Operating Co.*, 876 F.2d at 49; *Amerada Hess*, 52 F.E.R.C. at 61,988.

ExxonMobil faults the Commission for failing to give weight to the previously "settled status" of the classification of Sea Robin's pipeline as engaged in jurisdictional transportation. However, as alluded to above, these petitions, like those in *Conoco,* "arise in the wake of major regulatory changes in the natural gas industry." *Conoco*, 90 F.3d at 539. Whereas Sea Robin was once involved in sales and transportation, now it is strictly a transportation-only pipeline. When interstate gas pipelines served the multi-function role of purchasing, gathering, transporting, and re-selling natural gas, *i.e.* bundled sales, the transportation/gathering jurisdictional question may have been of less consequence. *See, e.g., El Paso Natural Gas Co.*, 72 F.E.R.C. ¶ 61,219, at 62,002, 1995 WL 544234 (1995) ("Under [a] bundled sales regulatory environment, the gathering/transmission function distinction was not as important as it is in a post-Order 636 environment [requiring unbundling]. . . . Consequently, many facilities that actually perform a gathering function originally were construed under [Natural Gas Act] section 7 certificates."); *CNG Transmission Corp.*, 67 F.E.R.C. ¶ 61,330, at 62,177, 1994 WL 270455 (1994). Thus, the historical classification of Sea Robin's system is of limited utility. Moreover, the Fifth Circuit expressly instructed FERC in this case to relegate non-physical factors, such as the "settled status" of a pipeline, and the expectations of shippers to secondary status: "If the Commission is to remain tethered to the statute, as it must, that inquiry must be based primarily on physical criteria and the realities of the field." *Sea Robin I*, 127 F.3d at 371. The Fifth Circuit held that "general business activity and prior certification are relevant, but they are only part of the mix." *Id.* We agree. Therefore, as FERC adequately considered non-physical

factors, but properly relied primarily on physical factors, again, we cannot find its decision to decline jurisdiction over a portion of Sea Robin's system unreasonable.

Similarly, we find ExxonMobil's argument that FERC's jurisdictional ruling has created an "utterly illogical situation," wherein gas is transported on a jurisdictional pipeline (the Garden Banks pipeline) into a non-jurisdictional gathering leg of Sea Robin's pipeline, unavailing. Petitioners rely on *Tarpon Transmission Co.*, 60 F.E.R.C. ¶ 61,041, 1992 WL 166429 (1992), and *Trunkline Gas Co.*, 70 F.E.R.C. ¶ 61,163, 1995 WL 58234 (1995), for the proposition that the presence of an interconnection with an upstream jurisdictional facility compels a finding that the downstream facility is likewise jurisdictional. First, reliance on these orders for such a proposition is inherently suspect as in both instances the classification of the upstream system was in dispute, and in both cases the upstream system was reclassified as non-jurisdictional. If anything, this suggests that it is the Garden Banks pipeline, rather than Sea Robin, that has been erroneously classified. To hold that the Garden Banks pipeline's jurisdictional status compelled FERC to classify Sea Robin's system as jurisdictional would create a classic example of circular reasoning. When Garden Banks requested a non-jurisdictional gathering classification, FERC ruled that it was jurisdictional *because it was located "proximate to jurisdictional lines."* *Shell Gas Pipeline Co.*, 74 F.E.R.C. ¶ 61,277, at 61,897, 1996 WL 111350 (1996) (emphasis added). Thus, proximity to Sea Robin, among other pipelines, resulted in Garden Banks's jurisdictional classification. To now hold that Garden Banks's interconnection with Sea Robin requires the latter to also be jurisdictional, is for the tail to wag the dog. Perhaps the present inconsistent treatment of the Garden Banks pipeline and the Sea Robin pipeline is "positively absurd," as suggested by the dissent, Dis. Op. at 7, but that does not mean that the problem is necessarily with Sea Robin's

classification. FERC has been struggling with the reclassification of facilities in the wake of the unbundling of gas sales and interstate transportation in Order No. 636. *See Conoco*, 90 F.3d at 539-41. As it is entirely appropriate for FERC to proceed on a case-by-case basis, *see SEC v. Chenery Corp.*, 332 U.S. 194, 202-03, 67 S.Ct. 1575, 1580-81, 91 L.Ed. 1995 (1947), then "the reform may take one step at a time." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). We do not mean to pre-judge how FERC might apply its reformulated primary function test to Garden Banks. We only conclude that the status of the Garden Banks pipeline does not render the Commission's reclassification of portions of Sea Robin's system unreasonable.

We turn now to ExxonMobil's least persuasive argument—that FERC's determination that portions of Sea Robin's system are engaged in non-jurisdictional gathering results in a "regulatory gap." We find this argument no more persuasive than did the Fifth Circuit. We emphatically agree that "[n]eed for regulation cannot alone create authority to regulate." *Sea Robin I*, 127 F.3d at 371. Rather it is *statutory authorization* alone that gives FERC the authority to regulate, and in the absence of such authority, FERC's action "'is plainly contrary to law and cannot stand.'" *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C.Cir.2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir.2001)). Here Congress clearly contemplates that the Commission will not have jurisdiction under the Natural Gas Act over "the production or gathering of natural gas." 15 U.S.C. § 717(b). The language could not be any plainer. We have repeatedly admonished federal agencies that jurisdiction may not be *presumed* based solely on the fact that there is not an express withholding of jurisdiction. *E.g., Atlantic City Elec. Co.*, 295 F.3d at 8-9; *Michigan*, 268 F.3d at 1082; *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C.Cir.1995); *Ethyl*

Corp. v. EPA, 51 F.3d 1053, 1060 (D.C.Cir.1995). Where Congress has gone so far as to *expressly* delineate the limits of agency jurisdiction, we cannot fault the Commission for taking a conservative view of its own authority.

Finally, we can quickly dispense with ExxonMobil's argument that Sea Robin's system was subject to abandonment proceedings under section 7(b) of the Act, 15 U.S.C. § 717f(b). Simply put, Sea Robin does not seek to abandon any facilities or services. Rather, it merely seeks to be able to continue operating previously certificated facilities as gathering facilities, exempt from FERC's jurisdiction under the Natural Gas Act. This is not "abandonment" within the meaning of section 7(b). *Cf. Conoco*, 90 F.3d at 553. In addition, section 7(b) only applies to jurisdictional facilities, and "do[es] not expand the Commission's § 1(b) jurisdiction." *Id.* Therefore it cannot be used to bootstrap FERC jurisdiction here.

B.

The Producer Coalition argues that the scope of the "gathering" exemption under section 1(b) of the Natural Gas Act is defined by the concept of "feeder lines" in the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq*. Under OCSLA, the Commission is responsible for ensuring open and nondiscriminatory access to transportation of oil and gas for all shippers on the Outer Continental Shelf. 43 U.S.C. § 1334(f)(1)(A). FERC, however, may exempt from OCSLA's requirements "any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed." 43 U.S.C. § 1334(f)(2). The Producer Coalition contends that the scope of exemption for "feeder lines" is coterminous with "gathering" facilities under the Natural Gas Act. Thus, in essence the Producer

Coalition contends that FERC's reformulated primary function test is unnecessary and that the Commission has stumbled under *Chevron* step one.

In support of its position, the Producer Coalition relies on bits and pieces of legislative history surrounding the 1978 Amendments to OCSLA. But snippets of legislative history do not a law make. *Accord Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24, 11 L.Ed. 469 (1845); *In re Sealed Case*, 237 F.3d 657, 669 (D.C.Cir.2001) ("The limits on the Commission's authority—like that authority itself—are derived from statutory provisions, not from loosely worded fragments extracted from congressional reports and speeches"). Petitioners offer no direct evidence of congressional intent to fill in the Natural Gas Act definition of "gathering" *sub silentio* by reference to the feeder line concept. Indeed, there is no definition of "gathering" in the OCSLA, and it does not even use the term. Rather the Producer Coalition relies on isolated excerpts from the floor discussion by Congressman Sieberling. While Congressman Sieberling may have spoken, Congress has not.

Morever, it would be anomalous to treat the "feeder line" provision of OCSLA and the "gathering" exemption of the Natural Gas Act as redundant. Under the Producer Coalition's interpretation, in enacting the OCSLA Amendments, Congress would have replicated the non-discriminatory provisions already contained in the Natural Gas Act. *Compare* 43 U.S.C. § 1334(f)(a)(1)(A) (OCSLA), *with* 15 U.S.C. §§ 717c(b), 717d(a) (Natural Gas Act). Likewise, there would have been no need to authorize the Commission to exempt "feeder lines" from FERC jurisdiction if they were already exempt as gathering facilities. Rather, a more plausible inference is that Congress amended OCSLA to make OCS facilities not covered by the Natural Gas Act subject to similar nondiscriminatory requirements, with the exception of "feeder lines." However, we do not decide

whether it would be reasonable for FERC to equate the feeder line and gathering facilities exemptions. We simply hold that FERC's interpretation of section 1(b) of the Natural Gas Act is not unreasonable, and therefore *Chevron* deference is applicable.

III. Conclusion

FERC's jurisdiction over natural gas pipelines "demands the drawing of jurisdictional lines, even when the end of gathering is not easily located." *Sea Robin I*, 127 F.3d at 371. Although we might draw a different line, we cannot say that the Commission acted unreasonably in concluding that the Vermilion 149 Station is the place where nonjurisdictional gathering ends and jurisdictional transportation begins. It is not our role to substitute our own judgment for that of the agency. Given the instructions of the United States Court of Appeals for the Fifth Circuit on remand, we cannot say that FERC has failed to give appropriate consideration to the primary physical factors and the secondary non-physical factors of its reformulated primary function test. Therefore the petitions for review are denied.

So ordered.

HARRY T. EDWARDS, Circuit Judge, dissenting.

The issue in this case focuses on the line between the "transportation" of natural gas and the "gathering" of natural gas. For many years, most of the Sea Robin Pipeline Company complex in the Gulf of Mexico has been designated as a *transportation* facility, and, thus, within the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or "Commission") under the Natural Gas Act ("NGA"). Now, however, the Commission has partially reversed that settled status, reclassifying a major segment of the Sea Robin pipeline as engaged in nonjurisdictional gathering. In my view, FERC's decision is devoid of reasoned decision making. I therefore dissent from the court's decision denying the petition for review.

* * * *

Sea Robin operates a massive pipeline complex (438 miles overall), almost all of which is located offshore on top of the Outer Continental Shelf ("OCS") in the Gulf of Mexico. This system is shaped like an inverted "Y," whose two arms sweep across the OCS to meet at a point approximately 50 miles off the coast of Louisiana. The Vermillion 149 Compressor Station sits at this point of convergence. There, much of the gas flowing from various production platforms that feed into the system comes together for shipment 66 miles north to Sea Robin's onshore processing plants near Erath, Louisiana. During the journey to Erath, the aggregated gas is joined by additional gas from four platforms located closer to the shore. Once the gas reaches shore, it is separated, dehydrated, and processed, then transported to the Erath Compressor Station from whence it is pumped into interstate pipelines for downstream delivery. (See Appendix.)

Before the challenged reclassification of the Sea Robin system, once the gas was produced and gathered at the production platforms south (upstream) of Vermillion, it was deemed to be in "transportation," and thus within FERC's

jurisdiction. In 1995, Sea Robin sought to undo this regulatory situation. The company asked FERC for an order declaring that its pipelines were gathering facilities exempt from the Commission's jurisdiction under the § 1(b) of the NGA. FERC refused, holding that the primary function of Sea Robin's system was transportation. *Sea Robin Pipeline Co.*, 71 F.E.R.C. (CCH) ¶ 61,351, 1995 WL 361806 (1995). Rehearing was sought, but denied, *Sea Robin Pipeline Co.*, 75 F.E.R.C. ¶ 61,332, 1996 WL 355518 (1996), leading Sea Robin to petition for review in the Fifth Circuit. The court granted the petition, remanding the case to FERC for further consideration. *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir.1997) ("*Sea Robin I*").

Sea Robin I held that the Commission's decision to deny reclassification was arbitrary and capricious because the agency did not fairly apply the "primary function" test that it had adopted as the touchstone for its analysis. In *Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,063, 1983 WL 39391 (1983), and subsequent decisions, FERC had identified six factors that were to guide the functional inquiry into whether a pipeline is a gatherer or a transporter:

(1) the diameter and length of the facility

(2) the location of compressors and processing plants

(3) the extension of facility beyond the central point in the field

(4) the location of wells along the facility

(5) the geographical configuration of the field

(6) the operating pressure of the line

See EP Operating Co. v. FERC, 876 F.2d 46, 48 (5th Cir.1989).

This test was developed for, and most readily applies to, land-based pipeline facilities. In order to account for the differences between onshore and offshore facilities, FERC

subsequently attempted to refine the above analysis. *See Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, 1990 WL 1241336 (1990). Because technological advances had allowed drilling and gas production to take place further and further from land, gathering pipelines of increasing length and diameter were being used in places such as the OCS. This reality suggested to FERC that it adopt a "sliding scale" approach to the physical factors identified in *Farmland*: the deeper and further from shore a pipeline, the longer and wider it could be and still be deemed a gatherer. Moreover, in order to ensure that such pipes were properly classified, the agency announced that it would consider certain non-physical factors when applying the primary function analysis. These include the (1) purpose, location, and operation of the facility; (2) the general business activity of the facility; and (3) the overall objectives of the NGA and Natural Gas Policy Act. *Id.* at 61,988.

Sea Robin I held that the Commission erred in selectively applying the *Farmland* factors, over-relying on the non-physical factors described in *Amerada Hess,* and failing to apply the "sliding scale." First, the court held that the Commission impermissibly "reduced the primary function analysis to a litmus test that turned on the length and diameter of the overall system." 127 F.3d at 370. That is, FERC classified Sea Robin's system as one engaged in transportation simply because of the size of its pipes alone, deeming the other *Farmland* factors inapplicable. In so doing, the Commission abandoned, "without reasoned consideration," its earlier recognition that the exigencies of moving offshore gas long-distances to land may require larger pipelines that should not necessarily be classified as transporters. *Id.*

Second, *Sea Robin I* criticized the agency for treating the non-physical factors as the equals of the physical factors in making the gathering/transportation distinction. The Fifth

Circuit reminded FERC that this distinction, as understood by Congress, was primarily a tangible, operational one. As such, while non-physical criteria may be considered, they must remain a secondary "part of the mix," not the starting point for the rest of the analysis. *See id.* at 370-71. Because FERC seemed to have misunderstood these points, the court remanded the case, suggesting that the Commission

> may reformulate its primary function test. It may choose to discontinue criteria not relevant to the physical, geographical, and operational characteristics of pipelines in the OCS. The record suggests other criteria, such as the quality of the gas in the pipelines and the depth of the water in the offshore production area, that may be relevant to the inquiry.

Id. at 371.

The court recognized that the agency might be able to justify drawing the jurisdictional line between gathering and transportation at a point internal to the Sea Robin system, but this suggestion was offered merely in passing dicta. Nothing in the Fifth Circuit's opinion in *Sea Robin I* in any way *compelled* FERC to draw the jurisdictional line at a point internal to Sea Robin's overall system. Nor did anything in the court's opinion *compel* the Commission to select the Vermillion Compressor Station as the dividing point between non-jurisdictional gathering and jurisdictional transportation. FERC, however, apparently threw up its hands in dismay upon reviewing *Sea Robin I*—obviously having no clue what to do to adhere to the court's mandate—and simply opted for Vermillion as the jurisdictional dividing line because it is "central" to the Sea Robin system.

This is the kind of case in which a judge welcomes the opportunity to defer to the expert judgment of a regulatory agency. However, I can find no evidence of FERC "expertise" in operation in this case. Indeed, I view FERC's

decision as totally lacking in reasoned decision making. Because of the Commission's inexplicable reliance on some passing dicta in *Sea Robin I*, its failure to offer a coherent explanation for the choice of Vermillion as the jurisdictional dividing line, and its complete failure to explain why it ignored other choices open to it, I can find no basis upon which to defer to the agency's decision. I therefore dissent.

* * * *

My starting point is the Supreme Court's oft-quoted statement in *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90, 83 S.Ct. 646, 649-50, 9 L.Ed.2d 601 (1963):

> '[P]roduction' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution.

In this case, Vermillion is a point where gas coming from different production platforms comes together to be transported further north; but Vermillion is not a place where gas is either *produced* or *gathered.* The production and gathering is done at the many production platforms south of Vermillion—this always has been FERC's understanding, and there are no changed circumstances in this case to justify a different conclusion.

Vermillion is merely a junction in the pipeline, where gas from two preceding forks in the pipeline road come together before the gas travels north in one pipe instead of two. Nothing else of any consequence happens at Vermillion—nothing. Surely a "fork in the road" cannot be the demarcation line between unregulated production/gathering and regulated transportation. Vermillion is not a place where Sea Robin engages in any "*physical acts of drawing the gas from the earth and preparing it for the first stages of distribution*";

it is not, therefore, a place of production and gathering as those terms have been "narrowly" defined by the Supreme Court.

* * * *

As I read the Commission's orders now under review, once FERC identified what it thought was the central point in the field, the Vermillion Station, it then largely ignored the physical characteristics of the pipelines that lay upstream (south) of that point. But, as petitioners rightly point out, those characteristics (size, pressure, configuration) are entirely compatible with a transportation function. If FERC meant to view the Sea Robin system in terms of its consistent parts, rather than as an integrated whole (as it had done prior to the Fifth Circuit's decision), the Commission should have applied its new analysis to each part of the facility that it sought to exempt from its regulatory jurisdiction. That, at least, seems to be the central *holding* of *Sea Robin I*. *See* 127 F.3d at 371 ("If the Commission is to remain tethered to the statute, as it must, [the jurisdictional] inquiry must be based primarily on physical criteria and the realities of the field."). The court's suggestion that FERC might analyze the various parts of the field was not an invitation to ignore the relevant physical properties of the Sea Robin facility.

FERC's focus on the purported *central point* of the Sea Robin field would have been plausible only if the agency had carefully examined the specifications of the entire pipeline system, both upstream and downstream of its designated midpoint. Indeed, FERC apparently understood this. *See Sea Robin Pipeline Co.*, Order Denying Rehearing, 92 F.E.R.C. (CCH) ¶ 61,072, at 61,291-92, 2000 WL 1100267 (2000). FERC, however, failed to make good on this understanding. The Commission claims to rely on the size of the pipes, the number of cross-connections, and the pressure of the gas in order to distinguish the lines downstream of Vermillion from those upstream. *See id.* However, none of these factors is

relevant, because not one supports the demarcation of gathering and transportation at Vermillion. On the upstream trunk legs, just as on the Vermillion-Erath line, raw highly pressurized gas is propelled over long distances through relatively wide pipes toward land. In other words, the so-called "central point" of the field is utterly irrelevant to a determination of the point where non-jurisdictional production and gathering become regulated transportation.

While the downstream, northern portion of the line may be punctuated by relatively few lateral connections (four), there are also only four laterals interrupting the final stage of the left trunk leg that runs toward Vermillion. Yet, FERC never examined whether the primary function of that upstream segment might be transportation.

FERC mentions the existence of compression at Vermillion, as if to suggest that this is a relevant consideration for purposes of comparison. It is not. The Sea Robin compressors both push and pull gas through the system, *pressurizing lines both upstream and downstream*. Indeed, in an earlier order, the Commission explicitly noted that pressure upstream of Vermillion "is similar to that of other offshore systems found to be transmission facilities." 71 F.E.R.C. at 62,402. FERC has never suggested that there is any *greater* pressure in the downstream segment. In fact, the *only* physical change that takes place at Vermillion is a marginal increase in the diameter of the pipelines heading north, which is hardly surprising in light of the fact that two upstream pipelines converge into one at the Vermillion junction. And while the pipes do get larger, the upstream trunk lines are also quite wide; indeed, the Commission's previous decisions recognize that those lines are just as compatible with transportation as the final Vermillion-Erath line. *See id.* at 62,398 ("Sea Robin's system is of the diameter and length that are more typical of an interstate transportation system rather than an exempt gathering system.").

FERC has thus asked this court to validate a determination that "gathering" ends where two large lines become one and grow proportionately wider as a result. This proposition is perplexing on its own terms, and it is unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.*, namely, that production and gathering entail only "the physical act[] of drawing the gas from the earth and preparing it for the first stages of distribution." 372 U.S. at 90, 83 S.Ct. at 650. The gas itself undergoes no alteration at Vermillion, nor does any event occur beyond the aggregation of gas that has already been partially aggregated, and will be further aggregated once it is processed for interstate distribution. Given these facts, there is no basis that I can discern for how the lines immediately upstream of Vermillion have as their primary function the gathering of natural gas while those immediately downstream do not.

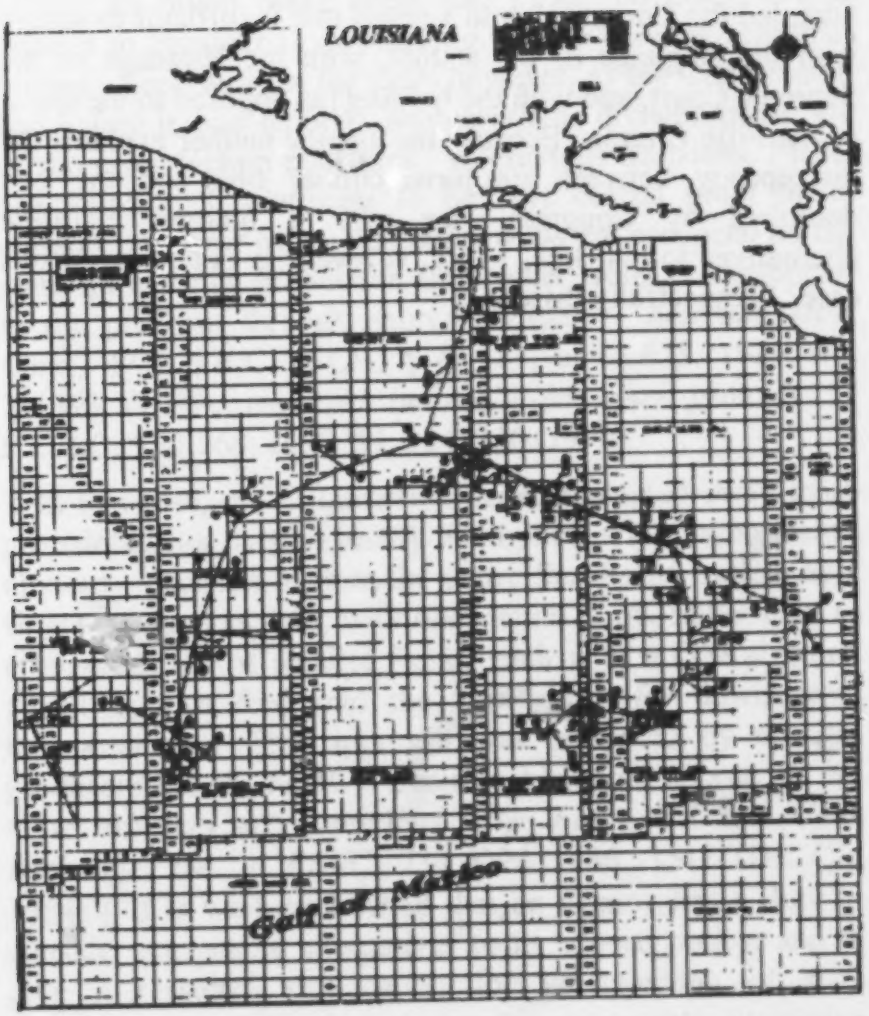
The Commission's reclassification decision becomes positively absurd when it is considered in the light of the "Garden Banks" transportation pipeline. The Garden Banks segment of line is south (upstream) of Vermillion and it is concededly a pipeline segment that is subject to FERC's regulatory jurisdiction. *See Shell Gas Pipeline Co.*, 74 F.E.R.C. ¶ 61,277, 1996 WL 111350 (1996). Yet, as a result of FERC's reclassification of the Sea Robin system, a situation has been created in which a jurisdictional "transportation" line (Garden Banks) flows into a non-jurisdictional pipeline segment upstream of Vermillion. Not surprisingly, FERC has previously disapproved of such situations, for it is facially illogical to have gas being *transported* to where it is *gathered* only then to be *transported* again. *See Trunkline Gas Co.*, 70 F.E.R.C. ¶ 61,163, 1995 WL 58234 (1995); *Tarpon Transmission Co.*, 60 F.E.R.C. ¶ 61,041, 1992 WL 166429 (1992). The Commission offers no reasonable justification for this unseemly situation, arguing meekly that this one factor should not be considered because other factors support FERC's judgment.

This all might make sense had FERC no other serious options to consider in discharging its line-drawing responsibilities. Such was not the case, however, as the Commission had before it, and ignored, another viable division point: the offshore production platforms. In previous decisions, FERC has found such platforms to be "the central point in an offshore gas field where numerous wells are produced on the platform and raw production from other wells is transported to the platform through short flowlines." *Amerada Hess Corp.*, 47 F.E.R.C. (CCH) ¶ 61,187, at 61,623, 1989 WL 261393 (1989), *modified on reh'g on other grounds* 52 F.E.R.C. ¶ 61,268, 1990 WL 1241336 (1990).

In this case, the Commission never explained away these precedents, nor tried to justify its implicit—and by no means obvious—decision to treat the entire Sea Robin system as a single production field, with one central point, rather than as an aggregation of smaller fields, each with a central point, which in turn feed into the trunk lines for downstream transportation. This approach was presented by the gas producers below; FERC's decision to ignore it was, in my view, arbitrary and capricious. *See Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C.Cir. 1984) ("It is well established that an agency has a duty to consider reasonable alternatives to its chosen policy, and to give a reasoned explanation for its rejection of such alternatives."). Indeed, ignoring this reasonable alternative allowed the Commission to pay scant attention to the very thing that it was supposed to rely on most heavily: the physical properties of the facilities whose jurisdictional status it was endeavoring to determine.

In sum, under FERC's new legal regime, "gathering" ends where the widest pipe on a pipeline system starts and where the gas begins to flow on a direct angle to its processing plant. This approach takes insufficient account of those physical realities that might suggest a different demarcation

point between gathering and transportation, and, as applied here, led the Commission to a result that is difficult to square with the language of the statute, with the language of the Supreme Court, and with the holding (as opposed to the dicta) of the Fifth Circuit. Because the agency neither explains the discrepancy between its jurisdictional line and the one described by Congress, nor why it ignored plausible alternatives to that line, FERC is owed no deference in this case. I respectfully dissent.



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APPENDIX B

COMMISSION OPINIONS, ORDERS AND NOTICES

Docket No. CP95-168-003

SEA ROBIN PIPELINE COMPANY

Order Denying Rehearing
Issued July 26, 2000

Before Commissioners: James J. Hoecker, Chairman; William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

The subject of this proceeding is the jurisdictional status under the Natural Gas Act (NGA) of Sea Robin Pipeline Company (Sea Robin), an offshore natural gas pipeline system. On June 30, 1999, the Commission issued an order on remand pursuant to the instructions of the United States Court of Appeals for the Fifth Circuit (the Court) in its decision issued on October 23, 1997, in *Sea Robin Pipeline Company v. FERC* (*Sea Robin*).[1] The Commission's order on remand determined under the primary function test,[2] as reformulated in the light of the Court's decision, that the primary function of Sea Robin's facilities upstream of its Vermillion 149 Compressor Station is gathering, and that those facilities therefore are exempt from the Commission's NGA jurisdiction. The order on remand found that Sea Robin's facilities downstream of Vermillion 149 Compressor Station are properly classified as transmission.

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[1] 127 F. 3d 365 (Fifth Cir. 1997), *reh'g denied* (February 2, 1998), *order on remand*, 87 FERC ¶ 61,384 (1999).

[2] The Commission's primary function test was articulated in *Farmland Industries, Inc.* (*Farmland*), 23 FERC ¶ 61,063 (1983).

On July 30, 1999, timely requests for rehearing of the Commission's order on remand were filed by Burlington Resources Oil & Gas Company and Exxon Company, USA (jointly as Exxon), Indicated Parties,[3] the Interstate Natural Gas Association of America (INGAA), the Producer Coalition,[4] Sea Robin Gas Pipeline Company, and Williams Gas Processing-Gulf Coast Company, L.P (Williams Gas Processing).

In this order, the Commission is affirming its findings in its order on remand that Sea Robin's facilities downstream of Vermillion 149 Compressor Station are jurisdictional interstate transmission facilities and that non-jurisdictional gathering is the primary function of Sea Robin's facilities upstream of Vermillion 149 Compressor Station, which include the east and west legs of Sea Robin's inverted-Y system.

I. Background

This proceeding was initiated on January 20, 1995, by Sea Robin's filing a petition for a Declaratory Order requesting that the entirety of its offshore system be declared non-jurisdictional gathering facilities. On June 16, 1995, the Commission issued a decision analyzing Sea Robin's under the Commission's primary function test.[5] In that order, the

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[3] Amerada Hess Corporation, Amoco Production Company, Amoco Energy Trading Corporation, Andadarko Petroleum Corporation, Marathon Oil Company, Murphy Exploration & Production Company, Phillips Petroleum Company, Shell Offshore Inc., and Texaco Natural Gas Inc.

[4] Forest Oil Corporation, Houston Exploration Company, Newfield Exploration Company, Ocean Energy, Inc., and Water, Oil & Gas Corporation.

[5] As articulated in *Farmland*, 23 FERC ¶ 61,063 (1983), the Commission's primary function test takes into consideration the following factors as relevant: (1) the length and diameter of the pipeline; (2) the extension of the facility beyond the central point in the field; (3) the pipelines' geographic configuration; (4) the location of compressors and

Commission found that all of Sea Robin's pipeline facilities were properly classified as jurisdictional transportation facilities, rather than non-jurisdictional gathering facilities as asserted by Sea Robin.[6] On October 23, 1997, the Court issued its order vacating and remanding the Commission's declaratory order.[7]

On June 30, 1999, the Commission issued its order on remand pursuant to the Court's instructions.[8] In reaching the findings in that order, the Commission acted upon the Court's instructions that the Commission either: (1) could reapply the existing primary function test to the facts and circumstances of Sea Robin's facilities in the light of the Court's opinion; or (2) re-evaluate and, if necessary, reformulate the primary function test.[9]

In accordance with the Court's instructions, the Commission's order on remand articulated and applied a reformulated primary function test to determine the jurisdictional status of

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processing plants; (5) the location of wells along all or part of the facility; and (6) the operating pressure of the line. The primary function test has been found by the Commission to be applicable to both onshore and offshore facilities, as modified and applied to offshore facilities in *Amerada Hess Corporation*, 52 FERC ¶ 61,268 (1990), and now as further modified with respect to offshore facilities in the Commission's order on remand in this *Sea Robin Pipeline Company proceeding*, 87 FERC ¶ 61,384 (1999). The criteria set out in Farmland were not intended to be all inclusive. The Commission has also considered nonphysical criteria such as the intended purpose, location, and operation of the facility, the general business activity of the owner of the facility, and whether the jurisdictional determination is consistent with the objectives of the NGA and the NGPA.

[6] *Sea Robin Pipeline Company*, 71 FERC ¶ 61,351 (1995), *reh'g denied*, 75 FERC ¶ 61,332 (1996).

[7] *Sea Robin Pipeline Company v. FERC*, 127 F. 3d 365 (Fifth Cir. 1997), *reh'g denied* (February 2, 1998).

[8] 87 FERC ¶ 61,384 (1999).

[9] 127 F.3d. at 371.

Sea Robin's facilities. The result was the jurisdictional determination that gathering on Sea Robin's system ends at the Vermillion 149 Compressor Station and, therefore, only the Sea Robin facilities upstream of that point are exempt from the Commission's NGA jurisdiction. In arriving at that conclusion, the order on remand followed the Court's suggestion that the demarcation point between gathering and transmission on a system like Sea Robin's could be determined to be at a point internal to an overall pipeline system (here, the Vermillion 149 Compressor Station).[10]

As articulated and applied by the Commission in the order on remand, the primary function test is reformulated: (1) by the adoption of an additional analytical element that will be applicable to Outer Continental Shelf (OCS) pipeline facilities that Exhibit a particular physical design feature—*i.e.*, a centralized aggregation point; (2) by adjusting the weight to be afforded the primary function test's "behind-the-plant" criterion so that the location of processing plants is not necessarily determinative and can be outweighed by other factors; and (3) to focus primarily on physical factors. As discussed in the order on remand, the reformulated aspects of the primary function test are relevant to identifying physical characteristics distinguishing gathering from transportation in the offshore context.

II. Rehearing Requests

Sea Robin, INGAA and Williams Gas Processing argue in their rehearing requests that Sea Robin's entire system should be declared a non-jurisdictional gathering system. Exxon, Indicated Parties and the Producer Coalition (collectively "the Producer Groups") argue in their rehearing requests that the entirety of Sea Robin's system should be found a jurisdictional transmission system.

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[10] *Id.*

A. *The Producer Groups*

Generally, the Producer Groups contend that the new "centralized aggregation point" criterion has no relationship to the demarcation between gathering and transportation on offshore pipeline systems. The Producer Groups argue that the order on remand presents no record support for the need for this new test and otherwise fails to state any reason to justify the Commission's departure from prior precedent. The Producer Groups maintain the order on remand principally relied on the new factor based on a centralized aggregation point, and that it thus represents a mechanical application of a single bright line test, forbidden by the courts. The Producer Groups also claim that the adoption of the centralized aggregation point as a new factor ignore's the Court's invitation to adopt an OCS specific gathering/transportation test, seizing instead on the expedient of dividing Sea Robin based upon dicta in the court's opinion.

The Producer Groups claim that as a result of mechanically applying the centralized-aggregation-point factor, the June Order on remand declared, without analysis, huge portions of Sea Robin's system—everything upstream of the Vermillion 149 Compressor Station—to be engaged in gathering simply because they are located upstream of the last fork in the system. Accordingly, the Producer Groups maintain, the application of the centralized-aggregation-point factor is not consistent with the Supreme Court's admonition to narrowly construe the gathering exemption.[11]

Reliance on a centralized aggregation point is contrary, the Producers Groups believe, to the Supreme Court's explanation that "gathering" is narrowly confined to "the physical acts of drawing gas from the earth and preparing it for the

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[11] *Citing Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 418 (1986); *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690-91 (1947).

first stages of distribution."[12] They state that offshore, such preparation occurs on the production platform. The Producer Groups further maintain that, aside from the issue of whether it is appropriate to base jurisdictional determinations on the existence of a centralized aggregation point, the physical characteristics of the facilities upstream of Sea Robin's Vermillion 149 Compressor Station do not support a determination that those facilities perform a gathering function.

The Producer Groups also find fault with the order on remand on grounds that it fails to consider the non-physical factors relevant to Sea Robin (*e.g.*, general business purpose, prior certification, location of free water removal). They contend that in Sea Robin's case analysis of such non-physical factors indicates a transmission function for the entirety of Sea Robin's facilities. They further assert that while the Court in its remand order may have been concerned that the Commission gave too much consideration to non-physical factors in its prior orders, the Commission's order on remand ignores them entirely.

Similarly, the Producer Groups argue that the order on remand also ignores the integrated nature of Sea Robin's entire system. They claim that Sea Robin's system was designed as an integrated system to transport gas received from 71 producing areas to the onshore. The Producer Groups emphasize that the Commission has allowed Sea Robin rolled-in rate treatment for the costs of all of its facilities in the development of its existing postage stamp rates. This, they argue, demonstrates that the Commission has found that Sea Robin's system is fully integrated. They assert that the Commission can not retract such findings absent a showing of a change in Sea Robin's operations.

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[12] *Citing Northern Natural Gas Co. v. State Corp. Comm'n.*, 372 US 84, 89-90 (1963).

The Producer Groups also present the argument that the Commission's interpretation of gathering is overly broad and, being so, disregards Congressional intent by creating an unlawful regulatory gap and by failing to consider the adverse impact on consumers and producers of "decertificating" large portions of the existing OCS transportation grid.

Also, the Producer Groups claim that the order on remand unlawfully rescinded a portion of Sea Robin's certificates because it failed to first consider the public interest, Sea Robin's market power, competitive impacts and other factors relevant in determining whether such a result was permitted by the present and future public convenience. For this reason, the Producer Groups maintain that the recission of certification constitutes an impermissible *de facto* abandonment.

The Producer Groups criticize the order on remand because, in their view, the order failed to eliminate from the offshore primary function test the behind-the-plant and line-pressure factors. They maintain that these considerations are irrelevant to distinguishing between gathering and transmission on the OCS. Exxon, in particular, offers the argument that the Commission erred in failing to adopt an OCS gathering/transportation test that uses appropriate analytical tools.[13]

Among the Producer Groups, Indicated Parties' rehearing request introduces into the record for the first time a new fact relating to Garden Banks Gas Pipeline, L.L.C. (Garden Banks). Specifically, the Indicated Parties note that since the

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[13] Among the Producer Groups, Exxon offers as an alternative the following test: (1) facilities lying in water depths of 200+ meters are presumptively gathering up to the point of proximity to the established transportation grid; (2) at water depths less than 200 meters, facilities downstream of a "central platform in the field" are presumptively transportation facilities; and (3) for existing facilities, the current jurisdictional classifications govern the status of those facilities, absent demonstration that such classification was clearly erroneous.

issuance of the Commission's remanded 1995 Declaratory Order finding all of Sea Robin's facilities to be jurisdictional, Garden Banks has interconnected its jurisdictional pipeline with the east leg of Sea Robin's system in South Marsh Island Block 128. The Indicated Parties emphasize that this development has not been considered by the Commission in its prior orders in this proceeding.

In view of Sea Robin's interconnection with Garden Banks' interstate system, the Indicated Parties cite the Commission's consistent rulings in other cases that two interstate pipelines, each providing interstate transportation service, cannot be connected together by means of a non-jurisdictional gathering line.[14] Therefore, the Indicated Parties argue that, in addition to Sea Robin's facilities downstream of Vermillion 149 Compressor Station, at least that portion of the east leg of Sea Robin's inverted-Y system between the Vermilion 149 Compressor Station and the interconnection with Garden Banks also must remain classified as jurisdictional transmission facilities.

The Producer Groups also challenge the order on remand by claiming that it disregards their due process rights by failing to make any reference to, or identify any reliance on, the record generated in the Commission's Notice of Inquiry in Docket No. RM98-8-000.[15] Alternatively, these parties claim that if the Commission did not rely on the record in Docket No. RM98-8-000, the Commission must be faulted for having made no attempt in the instant docket to institute

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[14] *See, e.g., Tarpon Transmission Co.*, 60 FERC ¶ 61,041, at p. 61,150 *reh'g denied*, 61 FERC ¶ 61,249 (1992), *on reconsideration on other grounds*, 78 FERC ¶ 61,278 (1997).

[15] *Notice of Inquiry, Alternative Methods for Regulating Natural Gas Pipeline Facilities and Services on the Outer Continental Shelf*, 63 Fed. Reg. 30,675 (June 1, 1998).

proceedings and develop a record that reflects the views of the parties on how best to proceed in accordance with the Court's remand.

The Producer Coalition, in particular, asserts that the inquiry proceeding in Docket No RM98-8-000 was a "proxy" for developing a record on remand in this proceeding and was so understood by the parties. The Producer Coalition contends that having requested comments in Docket No. RM98-8-000 in lieu of establishing a briefing schedule in this docket, the Commission does not have the prerogative to ignore the comments filed in response to the Notice of Inquiry. The Producer Coalition believes the comments it filed in Docket No. RM98-8-000 presented specific evidence of Congressional intent on the issue of what constitutes gathering on the OCS. Therefore, if the Commission fails to consider that evidence in this proceeding, the Producer Coalition believe such failure would constitute a lack of reasoned decision-making.

Respecting the legislative history of the Outer Continental Shelf Lands Act (OCSLA), the Producer Coalition argues that the reformulated primary function test set forth by the order on remand will permit natural monopolists unfettered market power over essential facilities on the OCS, contrary to express Congressional intent regarding gathering operations on the OCS. The Producer Coalition states that there is no indication in the legislative history of the OCSLA, or its amendments, that Congress intended to exempt from the NGA any portion of the flow of gas across the OCS. On the basis of this assertion, the Producer Coalition further avers that the test articulated in the order on remand, by exempting a significant amount of OCS pipeline facilities from the NGA, runs counter to the Congressional purpose underlying the NGA of creating a comprehensive regulatory scheme, in which federal and state regulation would complement each other.

The Producer Coalition further maintains that the order on remand fails to reflect Congressional intent expressed in the OCSLA as to what constitutes gathering on the OCS. In the view of the Producer Coalition, this intent was incorporated in the OCSLA's definition of "feeder lines."[16] Under the Producer Coalition's theory, gathering on the OCS properly is limited to the movement of gas from the wellhead through the point where it is first collected, separated or dehydrated on an OCS platform in preparation for injection into a pipeline for transportation to shore. In support of that position, the Producer Coalition contends that the OCSLA's legislative history—in particular, the Committee reports and floor debates—clearly show that only those lines defined as "feeder lines" were intended to be the functional equivalent of NGA gathering lines and that the OCSLA open-access requirements[17] were intended to supplement, not replace, NGA regulation on the OCS.

Since the Producer Coalition believes that defining offshore gathering facilities so as to exclude anything other than "feeder lines" would be consistent with Congressional intent and the OCSLA, the Producer Coalition argues that the Commission should adopt this definition and give it significant weight in making jurisdiction jurisdictional determinations under the NGA regarding OCS facilities. The Producer Coalition stresses that under its test, Sea Robin's entire system would be classified as a jurisdictional transportation system.

The Producer Groups argue that until issuance of the order on remand, producers and pipelines understood that the existing OCS interstate pipeline grid was subject to NGA regulation and thus they could plan their own operations on that basis. Now, they believe the order on remand jeopardizes

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[16] 43 U.S.C. § 1334(f)(10).

[17] 43 U.S.C. § 1334(f)(2).

that regulatory and relative price certainty and the planning and construction of deepwater facilities undertaken based on that assurance. Thus, they assert the order on remand will affect adversely not only Sea Robin's existing customers but the entire OCS interstate pipeline grid, as well as the development of new upstream deepwater systems.

In view of the potential changes in the jurisdictional status of OCS pipelines, the Producer Groups claim that the reformulated primary function test will hamper the Commission's objective in the OCS Policy Statement[18] of fostering the orderly development of deepwater reserves by permitting new deepwater pipelines to be constructed to connect with the existing OCS interstate pipeline grid. The Indicated Parties state that approximately 7,000-8,000 miles of presently jurisdictional facilities offshore could be declared non-jurisdictional as a result of the revised test in the order on remand.

B. *The Pipelines*

INGAA and Sea Robin argue that the order on remand unlawfully diminishes the significance of the behind-the-plant test by failing to adequately explain the legal and factual basis for departing from the past practice of its being given significant, if not determinative, weight. INGAA emphasizes that the Commission has utilized the behind-the-plant factor as being indicative of a gathering function in numerous offshore cases since 1980.[19] In addition, INGAA contends

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[18] *Statement of Policy, Gas Pipeline Facilities on the Outer Continental Shelf—Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act*, 74 FERC ¶ 61,222 (1996).

[19] *Citing Superior Oil Company*, 13 FERC ¶ 61,218, at pp. 61,495-96 (1980); *Exxon Corp.*, 45 FERC ¶ 61,436, at p. 62,390 (1988); *Mobil Oil Exploration & Producing Southeast, Inc.*, 46 FERC ¶ 61,014, at p. 61,096 (1989); *Shell Offshore, Inc.*, 46 FERC ¶ 61,228, at p. 61,688 (1989); *Hall-Houston Oil Co.*, 46 FERC ¶ 61,233, at pp. 61,698-99 (1989); *Blue*

that the order fails to take into account the Court's observation that the quality of gas in particular facilities is relevant to whether those facilities are engaged in gathering, rather than transmission. Sea Robin and INGAA further contend that the location of processing plants is important because in most cases unprocessed gas will not meet the specifications for transportation by pipelines making interstate deliveries.

Sea Robin emphasizes that it delivers gas that cannot be transported further in interstate commerce until it has been processed. Sea Robin claims that this fact is a determinative indication of a gathering function. Sea Robin maintains that discounting the behind-the-plant factor is contrary to the Court's instruction that the Commission must not discount, without reasoned analysis, application of any factor which points to a non-jurisdictional result. Respecting the relevance of the behind-the-plant test on the OCS as a demarcation point versus its application onshore, Sea Robin claims that it is not the configuration of the facilities that is different; it is the distance and size of the facilities offshore that are different.

INGAA, and Williams Gas Processing maintain that Sea Robin's entire system is properly classified as a non-jurisdictional gathering facility because it meets all six factors of the primary function test as applied by the court in *EP Operating v. FERC* (*EP Operating*).[20] Williams Gas Processing advances the contention that the order on remand erred in not finding that all of Sea Robin's facilities constitute gathering by failing to apply the governing standard, *i.e.*, the

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Dolphin Pipe Line Co., 58 FERC ¶ 61,103, at pp. 61,362-63 (1992); *TOMCAT*, 59 FERC ¶ 61,340, at pp. 62,239-40 (1992); *Pacific Offshore Pipeline Co.*, 64 FERC ¶ 61,167, at p. 62,509 (1993); *Viosca Knoll Gathering System*, 66 FERC ¶ 61,237, at pp. 61,579-80 (1994); and *Superior Offshore Pipeline Co.*, 67 FERC ¶ 61,253, at pp. 61,834-35 (1994).

[20] 876 F.2d 46 (Fifth Cir. 1989).

"sliding-scale" of the modified primary function test. Williams and Sea Robin also maintain that the order on remand failed to adhere to the Court's finding in *Sea Robin* that the efficiencies associated with moving large volumes of gas to shore may require the use of long-length and large-diameter pipeline.

Williams Gas Processing especially makes note of the contention that the downstream, shore-connecting stem of Sea Robin's inverted-Y system is an integral part of Sea Robin's integrated collection system. Williams states that the stem of the inverted-Y system is the functional equivalent of the facilities found to be non-jurisdictional in *EP Operating*. According to Williams Gas Processing's view, rather than building a number of smaller-diameter lines, as EP-Operating did, to reach from numerous offshore gas fields and ultimately converge upon a single point onshore for processing, Sea Robin opted for a more practical design.

Williams avers that if Sea Robin, like EP Operating, had constructed a system of smaller-diameter lines, each separate line would have clearly qualified as gathering because: (1) the physical dimensions of each line would reflect the needs and location of a particular field; and (2) the central point would be the onshore processing plant where the radial lines converged. Arguing that Sea Robin's configuration is both functionally equivalent and superior to a converging radial system, Williams Gas Processing asserts that it defies logic that prudent pipeline planning that uses a more economic, more efficient, and more environmentally sensitive inverted-Y configuration should lose its gathering status.

Sea Robin and Williams Gas Processing also argue that the compression on Sea Robin's system is an integral part of the offshore gathering process because it is a function of the quality of the raw, dual-phase stream flowing through the system and is necessary not only to push the gas to shore but also to pull it from the production areas. In this regard,

Williams Gas Processing asserts that the jurisdictional determination in the order on remand cannot be reconciled with orders declaring similar facilities to be exempt gathering facilities. Sea Robin argues that the compression at its Vermillion 149 Compressor Station is consistent with the function of field compression because it both maintains the pressure on the east and west legs upstream and restores the pressure of gas gathered through those legs downstream. Sea Robin cites a case involving onshore facilities in which the Commission found a compressor station three times as large as Vermillion 149 to be gathering based on its location behind a processing plant and its purpose of pushing gas for delivery into the interstate market.[21]

Sea Robin argues that the order on remand violates the principles set forth by the Court in its remand order in that, rather than looking at the totality of the circumstances, the Commission focused on one factor, the centralized aggregation point, of the reformulated primary function test and chose to weigh its decision in favor of that factor, while substantially discounting other factors that would had led to a finding of gathering. Sea Robin further contends that the Commission's new reliance on the centralized-aggregation-point criterion is an arbitrary revitalization of the central-point-in-the-field factor that the Commission had in prior cases determined to be of little utility in analyzing offshore facilities.

Sea Robin desires the factors of the primary function test to be applied in order to achieve a finding of gathering for the entirety of its system. Sea Robin argues the sole purpose of the 36-inch diameter stem of its inverted-Y system, a line which runs from the Vermillion 149 Compressor Station to the onshore Erath Compressor Station (Vermillion 149-Erath Line), is to deliver non-pipeline quality gas collected from 67

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[21] *Citing El Paso Natural Gas Company*, 82 FERC ¶ 61,337 (1998).

offshore platforms to onshore processing plants. Sea Robin contends that splitting its overall system at the Vermillion 149 Compressor Station draws an arbitrary line that has nothing to do with the function of the facilities and everything to do with the size of the facilities on either side of that location.

In support of its position, Sea Robin claims that, notwithstanding the larger diameter of the 36-inch Vermillion 149-Erath Line, the purpose of that line is gathering, the same as its system's east and west legs upstream of the Vermillion 149 Compressor Station. Sea Robin emphasizes that no deliveries of gas are made off of the Vermillion 149-Erath Line to other pipelines. Sea Robin further argues that a significant indicator of the Vermillion 149-Erath Line's gathering function is the fact that there are five gas receipt points on the line. Sea Robin stresses that one of these receipt points is as far north as Vermillion Bay and that north of that receipt point, the line enters an environmentally protected area.

III. Discussion

A. *The Reformulated Primary Function Test is Consistent with the Court's Instructions*

The Commission disagrees with the petitioner's assertions, both those arguing for a jurisdictional test that would include more OCS facilities within the definition of "gathering facilities," and those that contend that the test adopted in the order on remand will encompass unjustifiably too few facilities within that class. Contrary to the contentions of the petitioners for rehearing, the order on remand is fully in accord with the instructions of the Court. As discussed above, the Court's *Sea Robin* opinion gave the Commission two options: the Commission could either: (1) reapply the existing primary function test in the light of the Court's opinion; or (2) re-evaluate and, if necessary, reformulate the primary function test. The Commission chose to follow the latter course of

action. Specifically, the Commission applied a reformulation of the primary function test in determining that gathering on Sea Robin's system ends at the Vermillion 149 Compressor Station.

The reformulated aspects of the primary function test that were articulated and applied in the order on remand are: (1) the adoption of an additional analytical element applicable to OCS pipeline facilities that exhibit a particular physical design feature—*i.e.*, a "centralized aggregation point"—which, while not the determinative factor, will be given weight in applicable cases "in identifying the demarcation point between gathering and transportation on OCS pipeline systems;"[22] (2) an adjustment in the weight to be afforded the behind-the-plant criterion, the result of which is that the location of processing plants on the OCS will not necessarily be a determinative factor, but rather can be outweighed by other factors[23] and; (3) a primary focus on physical factors.[24]

1. *The Reformulated Test is Based on Physical Factors Relevant to the OCS*

The petitioners argue that the Commission failed to follow the Court's direction that the Commission must ground its primary function test and base its determination on physical factors that are relevant to determining where gathering ends on the OCS. The Commission believes it has followed these directions, since the order on remand reformulated the primary function test for use as an OCS-specific test by adapting the onshore behind-the-plant and central-point-in-the field criteria to the offshore context. The reformulated and additional elements of the reformulated primary function test

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[22] 87 FERC at p. 62,426.

[23] *Id.*

[24] *Id.*

are reasonably relevant to identifying the physical characteristics distinguishing gathering from transportation on the OCS.

The Commission's reasons for the specific departures from the former primary function test were explained in the order on remand. First, the Commission briefly set out the history of the evolution of the primary function test in the onshore and offshore contexts. Then, as has been done in prior orders in this proceeding, the Commission again took official notice of the basic, reality-driven fact that, when dealing with offshore systems, the Commission generally cannot rely, as it often has when analyzing onshore systems, on the processing plant tailgate as the demarcation point between gathering and jurisdictional transmission. It has never been the subject of serious dispute at any point in the history of this case that the offshore realities of production-related economic, operational, and engineering factors preclude completion of gas processing close to the producing areas. Indeed, in the case several petitioners rely on in criticizing the Commission's order on remand—*EP Operating*—the Court acknowledged this abundantly clear physical and economic fact of life on the offshore.[25]

Respecting the new element of the centralized aggregation point, the order on remand did little more than recognize that the Vermillion 149 Compressor Station, when viewed within the guidelines established by the Court, is the point within Sea Robin's overall system that demarcates where the collection process is completed and where gas is aggregated at a narrowly confined location, compressed, and thereby propelled into a relatively much larger mainline for transmission into the onshore pipeline grid. In the order on remand, the factors analyzed, the Commission's assessment of those factors, and the result are responsive to the Court's

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[25] *EP Operating v. FERC*, 876 F . 2d. 46, 49 (Fifth Cir. 1989).

observation that, while the task in a case such as the instant proceeding may be difficult, the Commission must squarely address the fact that the demarcation point between gathering and transmission on a system like Sea Robin's may be located at a point internal to the overall system (here, the Vermillion 149 Compressor Station).[26]

The order on remand further explained that the centralized-aggregation-point criterion is analogous to the central-point-in-the-field criterion as that concept has been applied in the onshore context. Given the Court's directions and guidelines for determining at what point gathering ends, the coincidence of several smaller lines at a centralized location where the gas carried is delivered into a single, larger-diameter line for further delivery to market is the most logical point to place that demarcation point.

2. *The Justification for Reformulating the Primary Function Test*

In view of the emphasis placed by the Court on its instructions and the Commission's efforts to adhere to that guidance in the order on remand, the Commission cannot agree with the petitioners' argument that the order on remand failed to state any reason to justify the departure from prior precedent and that it presented no record support for the need for the new test. The Court rejected the Commission's existing method of applying the primary function test to Sea Robin's facilities. The Court gave the Commission the option of re-evaluating and reformulating the existing primary function test.

3. *Physical vs. Non-Physical Factors*

The Commission also finds unpersuasive the pipelines' argument that the order on remand is flawed because it failed to consider or did not give sufficient weight in the analysis of

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[26] 127 F. 3d at 371.

Sea Robin's system to non-physical factors that would be indicative of a transmission function for the entirety of Sea Robin's facilities. In reaching findings in our order on remand, we considered, as the Court directed, all relevant factors, including non-physical factors. We took into account Sea Robin's position as to its general business purpose, the Commission's prior certification of Sea Robin's entire system, and location of free water removal on Sea Robin's system.

However, the Court was clear in its ruling that the Commission's analysis and any reformulation of the primary function test must result in jurisdictional findings that are not inconsistent with the physical characteristics of offshore systems.[27] Thus, while the non-physical factors pertinent to Sea Robin have been set out at length in the Commission's prior orders in this proceeding, those non-physical factors could not be given more weight than the relevant physical factors in the Commission's analysis in the order on remand.

B. *The Commission Properly Applied the Reformulated Primary Function Test to Sea Robin's System*

1. *The Factors Considered in this Case*

The Court instructed the Commission not to base a jurisdictional finding on any one factor, *e.g.*, the size of the system.[28] Rather, the Commission must consider all of the factors that it determines are relevant.[29] In compliance with this instruction, the order on remand considered the totality of the relevant circumstances in assessing Sea Robin's system by considering all of the relevant physical aspects of the reformulated primary function test.

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[27] *Id.*

[28] 127 F. 3d At 365.

[29] 127 F. 3d at 371.

The foundation of the jurisdictional determination in the order on remand (*i.e.*, that the facilities upstream of Vermillion 149 are non-jurisdictional gathering facilities) was an examination and weighing by the Commission of the following relevant, physical factors:

(1) the 66.3 mile length of the Vermillion—Earth line;

(2) the 36-inch diameter of the Vermillion—Earth Line;

(3) the straight-line configuration of the Vermillion—Earth line;

(4) the inverted-Y configuration of the Sea Robin System;

(5) the existence of only four platforms along the length of the Vermillion—Earth Line as compared to the connections to 71 production platforms upstream of the Vermillion 149 Compressor Station;

(6) the abrupt change in physical attributes and configuration in the system occurring at the Vermillion 149 Compressor Station;

(7) the concentration of compression at the Vermillion 149 Compressor Station;

(8) the existence of a centralized aggregation location at the Vermillion 149 Compressor Station;

(9) the 4.5″—24″ diameters of the lines upstream of the Vermillion 149 Compressor Station;

(10) the existence of 45 laterals feeding into the two upstream arms of the inverted-Y upstream of the Vermillion 149 Compressor station;

(11) the presence of 71 production platforms connected to the system upstream of the Vermillion 149 Compressor station;

(12) the network configuration of Sea Robin's facilities upstream of the Vermillion 149 Compressor Station; and

(13) the onshore location of processing plants, which was not considered a determinative factor due to the geographic and technical characteristic of production and transportation offshore

2. *The Centralized Aggregation Point*

Several of the petitioners specifically criticize the new centralized-aggregation-point factor as being a "stand-in" for what they refer to as the Commission's prior reliance on the "unspoken sole-factor" test of size alone. This misapprehends the meaning and significance of the new factor. The new central-aggregation-point factor is not a sole-criterion, "bright-line" test. Rather, the centralized-aggregation-point is more appropriately viewed as a descriptive label for a set of a number of individual physical characteristics.

In other words, prior to the Commission's finding that the Vermillion 149 Compressor Station functions as a location within Sea Robin's overall system where natural gas is aggregated at a centralized point, the Commission first examined and assessed several physical characteristics. Specifically, the Commission's conclusion that the Vermillion 149 Compressor Station is properly viewed as the "centralized aggregation point" was based on a review of the following physical indicators, each of which individually are indicative of a gathering function on Sea Robin's system upstream of the Vermillion 149 station:

(1) the length and diameter of the line downstream of the Vermiilion 149 Compressor Station;

(2) the number of lines and platform connections upstream of the Vermillion 149 Compressor Station;

(3) the length and diameter of the downstream line in comparison to the length and diameters of the lines upstream of the Vermillion 149 Compressor Station;

(4) the existence of few wells downstream of the Vermillion 149 Compressor Station in comparison to the number of wells upstream of the Vermillion 149 Compressor Station;

(5) a network-type configuration upstream of the Vermillion 149 Compressor Station; and

(6) the presence of compression at the Vermillion 149 Compressor Station which functions to move gas to shore.

The combination of the specific physical attributes of the above individual factors on Sea Robin's system comprises an additional factor, which was also given weight in determining the system's jurisdictional status. Just as the historical behind-the-plant and central-point-in-the-field factors are based on the existence of a confluence of individual elements, the new centralized-aggregation-point factor also is an example of an additional physical factor that can arise as the result of the combination of several individual physical components, such as the above-described characteristics of Sea Robin's system.

Moreover, not only are the petitioners' arguments based upon an incorrect understanding of the significance of a centralized aggregation point, but they also miss the fact that the Commission's order on remand also considered, independently of the individual physical elements included under the umbrella of that concept, the totality of the relevant circumstances in assessing Sea Robin's system. As discussed above, in addition to finding that a centralized aggregation point exists internally within Sea Robin's system, the order on

remand considered all of the relevant physical aspects of the primary function test.

In view of the above, the Commission also finds little merit in the petitioners' argument that the order on remand simply declared, without analysis, portions of Sea Robin's system to be engaged in gathering simply because they are upstream of the last fork in the system. Rather, as noted above, in making the Commission's jurisdictional determination, the order as remand, as a prerequisite to finding the presence of a centralized aggregation location, considered the configuration, physical specifications, and function of the facilities upstream of the Vermillion 149 Compressor Station.

Similarly, the result of the Commission's application of the reformulated primary function test in this case is not contrary to the concept that "gathering is narrowly confined to the physical acts of drawing gas from the ground and preparing it for the first stages of distribution." The Court based its decision in part upon a recognition of that definition[30] and the Commission's order on remand is in accord with the instructions of the Court. Nowhere in the Court's opinion is it even suggested that the appropriate point of demarcation between gathering and transportation is at the production platform, as some of the petitioners advocate.

As for the opposite argument by other petitioners, a fair reading of the Court's opinion is that it rejected any notion that all of Sea Robin's facilities downstream of the production platforms with which its various segments interconnect are transmission facilities. Further, any and all arguments that the entirety of Sea Robin's system is jurisdictional have been exhausted and addressed by the Commission in its prior orders in this proceeding. Under the primary function test, as reformulated and applied in the order on remand, preparation of OCS gas for the first stages of distribution occurs at the

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[30] 127 F. 3d at 368.

Vermilion 149 Compressor Station where the gas collected from the multitude of upstream facilities is aggregated and injected into the large diameter Vermillion—Erath Line for transportation into the onshore interstate pipeline grid.

3. *The Integrated Design of Sea Robin's System*

The pipelines' argument that the order on remand erred because it did not take into consideration the "integrated nature" of Sea Robin's entire system is not compelling. Their argument is that the entire system is "integrated" because it [sic] the entire system is necessary to transport gas received from the 71 accessed producing areas to the onshore. Even if the Commission were to accept this "integrated" characterization of the design of Sea Robin's system, to find the entirety of Sea Robin's system is gathering on this basis would violate the Court's conceptualization that, to be consistent with Congressional intent, the Commission must draw the jurisdictional lines, even when the end of gathering is not easily located as, for example, when it occurs at a point internal to an overall system.

Nor is the Commission's jurisdictional determination influenced by the Producer Groups' contrary argument that Sea Robin's entire system should be found gathering on the grounds that the Commission approved rolled-in rate treatment for the costs of all of Sea Robin's facilities in the development of its existing postage stamp rates while the system was operated as a transmission facility. It is true that rate considerations have been raised aggressively in some of the proceedings in recent years in which interstate pipelines were spinning down to affiliates or spinning off to third parties their gathering facilities in response to the Commission's policies requiring pipelines to unbundle their transmission and gathering services and offer them under separately state rates. Some parties tried to couch their rate concerns as "jurisdictional" issues. However, while a pro-

ceeding to review jurisdictional status may lead to reallocation of costs, the Commission's prior rate treatment does not dictate where gathering ends on a particular system.

4. *Regulatory Gap*

The Commission does not agree with the Producer Groups' argument that the reformulated primary function test is overly broad because it will create an unlawful regulatory gap on the OCS. First, the Commission notes that the Court specifically rejected arguments based on those grounds.[31] Further, the Producer Groups' concerns are being addressed by the Commission's exercising its authority under the OCSLA, which gives the Commission sufficient authority over non-NGA jurisdictional pipelines to assure that regulatory goals are achieved.

Concurrently with this order, the Commission is issuing an order on rehearing of its final rule, Order No. 639,[32] in Docket No. RM99-5-000, which affirms the Commission's decision to promulgate regulations under the OCSLA to ensure that natural gas is transported on an open and nondiscriminatory basis by all gas service providers operating in the OCS. Order No. 639's regulations require OCS service providers to make available information regarding their affiliations and the conditions under which service is rendered. This information will assist the Commission and interested persons in determining whether OCS service providers pipelines are conforming with the open access and nondiscrimination mandates of the OCSLA and will enable shippers who believe they are being subjected to anticompetitive practices to bring their concerns to the Commission. The transactional transparency that reporting will bring should provide a sound basis

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[31] 127 F.3d at 371.

[32] 65 *Fed. Reg.* 20354 (April 17, 2000), *FERC Statutes and Regulations* ¶ 31,097.

for implementing the open and nondiscrimination access mandates of the OCSLA and produce greater efficiencies in the marketplace.

5. *The Procedures Followed*

The Commission disagrees with the arguments of the petitioners that the order on remand in some way violates their due process rights. The choice between proceeding by a general rulemaking proceeding or by an *ad hoc* adjudicative decision is one that lies primarily in the informed discretion of the Commission.[33] Here, rather than proceeding by way of a rulemaking based on comments received in response to the Commission's Notice of Inquiry in Docket No. RM98-8-000, the Commission exercised its administrative option to proceed by rendering a decision in the existing case-specific Sea Robin docket. Further, none of the petitioners has shown any harm that resulted because the Commission decided to articulate its reformulation of the primary function test in this remand proceeding, rather than by further action in the inquiry proceeding. The order on remand was based on the record in this proceeding; there was no requirement that the Commission rely on the record compiled in another proceeding to reach its decision here.

6. *The Impact of the Application of the Reformulated Test*

The Producer Groups claim that the existing interstate pipeline grid will be adversely impacted by the order, and that Sea Robin's existing customers, as well as new upstream deepwater systems, will be adversely affected. In addition, they assert that the order on remand will impact the Com-

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[33] *See, e.g., Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194 (1947).

mission's OCS Policy Statement[34] because the jurisdictional status of OCS pipelines that are part of the interstate pipeline grid will change.

The Commission is mindful, of course, of the impacts that may follow from its finding in the order on remand that the certificated, upstream east and west legs of Sea Robin's system are non-jurisdictional gathering facilities. Over the course of the past several years, shippers have raised concerns in numerous proceedings regarding potential rate impacts and other considerations affecting their continued access to facilities that have been reclassified from transmission to gathering. However, the issue before us in this case is a matter of jurisdiction and statutory interpretation. The remanding Court's directions on this point were clear. The Court ruled that while the practical effect of the determination of gathering is relevant, the primary consideration in formulating a jurisdictional test must be the physical characteristics that distinguish gathering from transmission.[35]

Thus, in preparing the order on remand, the Commission carefully analyzed Sea Robin's system and found that the Vermillion 149 Compressor Station serves as a central aggregation point for gas supplies gathered from production areas. The Commission concluded that a central-aggregation-point factor was an appropriate additional factor for consideration in offshore cases since, consistent with the Court's instructions and guidance, it permits the Commission to ascertain more readily the functional confluence of numerous individual physical characteristics, including the relative number of lines and platform connections upstream of a potential

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[34] *Gas Pipeline Facilities and Services on the Outer Continental Shelf-Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act*, Docket No. RM96-5-000, *Statement of Policy*, 74 FERC ¶ 61,222 (1996).

[35] 127 F.3d. at 371.

jurisdictional demarcation point on a system; the relative length and diameter of pipe upstream of the point; the number of wells accessed upstream of the point; network-type configuration upstream of the point; and the presence at that point of compression which functions to move gas to shore.

C. *The Legislative History of the OCSLA*

The Commission also rejects the argument that, as a result of the enactment of the 1978 amendments to the OCSLA, the Commission must adopt a "feeder line" definition of "gathering."[36] Under this theory, the entirety of Sea Robin's system would be classified as transmission. The petitioners' theory is legally deficient. First, there is no definition of "gathering" in the OCSLA. While the OCSLA does include a concept of "feeder lines,"[37] that is a concept that is unique to the OCSLA for purposes of defining those OCS pipeline facilities that the Commission may exempt from the provisions of the OCSLA. There is no indication whatsoever in the statute that the Congress intended for the Commission to adopt the OCSLA "feeder-line" definition for purposes of determining what facilities are exempt from the NGA under the "gathering" exemption contained in Section 1(b)n of the NGA. In fact, nowhere in the OCSLA is the term "gathering" found.

The line of cases that the petitioners rely on for this contention is not supportive. For example, in the case primarily relied on by the Producer Coalition,[38] the legislative history of a statue that was relied on was evidence relating to subsequent amendments to the statute at issue in the case. The other cited cases also involved legislative history of laws and subsequent amendments to those laws or the legislative

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[36] 43 U.S.C. § 1334(f)(2).

[37] *Id.*

[38] *See, e.g., Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980).

history relied on at least included some specific Congressional references to the relevant provisions of the law being interpreted. Thus, those cases provide no support for using references to "gathering" in the legislative history of the OCSLA in order to define "gathering" for purposes of 1(b) of the NGA. Additionally, when dealing with "isolated excerpts" from legislative history, it is contrary to "the guidance of the courts to presume general congressional awareness" of construction based only on a few isolated statements in thousands of pages of legislative documents.[39] "Language in a Committee report, without additional indication of more widespread congressional awareness, is simply not sufficient."[40]

D. *The Recission of Sea Robin's Certificates*

The Commission disagrees with the contentions of the Producer Groups that the recission of the pertinent certificates of public convenience and necessity that had been issued to Sea Robin at various points in the development of its system constitutes an impermissible *de facto* abandonment. The Producer Groups assert that these certificates must be an abandoned pursuant to the full panoply of public interest standards applicable under an abandonment of jurisdictional facilities under Section 7(b) of the NGA. Producer Groups maintain the June 30 Order falls short of this task. The Producer Groups note that Order No. 509 issued every certificated OCS pipeline, including Sea Robin, a blanket transportation certificate under Subpart G of Part 284 and made clear that such certificates could be abandoned only with explicit Commission approval under 7 (b) of NGA. In

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[39] *Securities and Exchange Commission v. Samuel H. Sloan*, 436 U.S. 103 (1978).

[40] *Id.*

addition, the Producer Groups contend the remand order also failed to identify specific certificates, facilities, and services to be rescinded.

Sea Robin has made no request for abandonment authorization with respect to any certificated portion of its system and should not be required to do so. Sea Robin does not seek to abandon any facilities or services in these proceedings. Sea Robin proposes no transfer of facilities to another entity nor does it intend to cease operating them. Further, Sea Robin does not seek to abandon, and the Commission has not rescinded, its blanket certificate authority. Sea Robin merely seeks to be able to continue operating previously certificated facilities as gathering facilities, exempt from the Commission's NGA jurisdiction, based on their current function. As in other cases where the current owner would continue to own and operate the facilities and the only issue was the jurisdictional status of the facilities,[41] the order on remand made its jurisdictional determination based on objective physical characteristics relevant to the facilities' primary function; it was not required to be supported by a finding of public interest.

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[41] The Commission has frequently rescinded certificates of public convenience and necessity based on a jurisdictional finding that the facilities and services authorized under certificates were exempt gathering or other non-jurisdictional facilities not subject to the Commission's NGA authority. *Amerada Hess Corporation et al.*, 52 FERC ¶ 61,268, at p. 62,027 and p. 62,030 (1990); *Gasdel Pipeline System, Inc.*, 86 FERC ¶ 61,251, at p. 61,908 (1999); *CNG Transmission Corp.*, 82 FERC ¶ 61,262, at p. 62,032 (1998); *Garden Banks Gas Pipeline, LLC*, 78 FERC ¶ 61,066, at p. 61,243 (1997) (vacating certificate orders, not pregranting abandonment authority, is appropriate Commission course if jurisdictional facilities found to be gathering); *Greeley Gas Company*, 75 FERC ¶ 61,015, at p. 61,053 (1996) (service area determination under NGA Section 7(f) resulting in vacating 7(c) certificate); *Pacific Offshore Pipeline Company*, 64 FERC ¶ 61,167, at p. 62,510 (1993); and *Pelican Interstate Gas System*, 61 FERC ¶ 61,025, at p. 61,129 (1992).

E. *Sea Robin's Interconnection with Garden Banks*

As noted above, the Indicated Producers' rehearing request introduced into the official record of this proceeding for the first time a fact that has not been considered either by the Commission or by the Court in the context of this case. Specifically, that Garden Banks, a certificated interstate pipeline, has interconnected with the east-leg of Sea Robin's system in South Marsh Block 128.[42] Garden Banks delivers gas into Sea Robin's system at their interconnection on the east leg of Sea Robin's inverted-Y system. The interconnection is approximately 100 miles upstream of Sea Robin's Vermillion 149 Compressor Station, which the Commission's order on remand found to be the demarcation point between Sea Robin's gathering and transmission functions.

In this proceeding, the Commission has thoroughly analyzed Sea Robin's pipeline system. In response to the Court's remand order, the Commission reviewed all its prior findings and made modifications to its jurisdictional determination. The Commission is not persuaded to disturb its earlier ruling in this long fought case solely on the basis of Sea Robin's current upstream interconnection with Garden Banks. Specifically, the Commission does not agree that the fact of Sea Robin's upstream interconnection with Garden Banks, by itself, compels a finding that the east leg of Sea Robin's system is jurisdictional. First, the *Tarpon* case, cited by the

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[42] The Garden Banks system is designed to provide capacity to transport towards shore gas produced in deep-water areas. The mainline of the Garden Banks system is a 50-mile, 30-inch diameter natural gas pipeline extending from a production platform in Garden Banks Block 128, offshore Louisiana to the Shell Gas Pipeline Company Platform in South Marsh Block 76, offshore Louisiana. The interconnection with Sea Robin's system is a 16-inch subsea tie-in located on the Garden Banks mainline, approximately 30 miles downstream of Garden Banks Block 128. The Banks system was declared to be a jurisdictional interstate transmission system in *Shell Gas Pipeline Company*, 74 FERC ¶ 61,277 (1996) and was placed into service on April 16, 1997.

Producer Groups,[43] predates the Court's remand order in *Sea Robin*, which precludes us from giving controlling weight to a single physical factor in applying the primary function test. Even in *Tarpon*, the presence of upstream facilities was not the only factor considered by the Commission. The Commission considered it "equally important" in that case to resolve the jurisdictional issue in a manner consistent with "the NGA and the procompetitive goals of the NGPA." In *Tarpon*, the Commission was concerned that a "disclaimer of jurisdiction in this case would subject producers and shippers to a potential monopolistic situation which would be inconsistent with those goals."[44] Regardless of whether it would be appropriate to give similar weight to nonphysical considerations following *Sea Robin*, such concerns are no longer present in this case for the reasons discussed below.[45]

In affirming the non-jurisdictional status of Sea Robin's upstream east and west legs, the Commission has considered the Producer Groups' concerns regarding the potential for unfettered exercise of monopoly power in the OCS. However, the Commission believes those concerns have been overtaken by the two significant events that have occurred since the Commission determined that Garden Banks' interconnecting upstream facilities are jurisdictional under the NGA. First, the Court's decision in *Sea Robin* was issued, providing guidance in applying the primary function test to offshore facilities, guidance the Commission followed in reformulating its primary function test in its order on remand. Second, the Commission has established regulations under the OCSLA to enable it to ensure that gas is transported offshore on an open

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[43] Note 14, *supra*.

[44] *Tarpon*, 60 FERC ¶ 61,041, at p. 61,150.

[45] The presence of jurisdictional upstream facilities may have greater significance onshore where the protections of the OCSLA do not apply.

and nondiscriminatory basis. This new rule makes the regulatory distinction between NGA-jurisdictional and NGA-exempt facilities less significant on the OCS.

Now that the Commission has instituted a regulatory regime under the OCSLA, applicable to all OCS facilities, to monitor compliance with competitive principles, the significance of a determination that an OCS facility is not subject to the NGA is diminished. Absent the new OCSLA regulatory scheme, the Commission would share the Producer Groups' concern that the reformulated primary function test in the order on remand could result in some OCS service providers being able to use their natural monopoly positions to exercise their market power over essential OCS facilities in a discriminatory manner, contrary to express Congressional intent regarding gathering operations on the OCS.

However, as discussed above, the new OCSLA regulations will require all OCS service providers—both NGA-exempt and NGA-jurisdictional pipelines—to file the information needed by the Commission to determine whether OCS service providers are conforming with the open access and nondiscrimination mandates of the OCSLA. This information will be available to shippers that believe they are being subjected to anticompetitive practices. A shipper will be able to use information in its OCS service provider's reports to support an allegation of anticompetitive treatment, enabling the shipper to bring its concerns to the Commission in a timely fashion. Thus, implementation of the new OCSLA reporting requirements will make the Commission better able to ensure that the integrated OCS natural gas transportation network will adhere to the OCSLA's open and nondiscriminatory access provisions, including with respect to rates, and the Commission will be less dependant on the NGA to prevent market power abuses.

The Commission orders:

The requests for rehearing of the order on remand are denied.

Commissioner Hébert dissented with a separate statement attached.

Curt L. HÉBERT, Jr., Commissioner, *dissenting*:

I continue to dissent for the reasons stated in my prior dissent issued June 30, 1999.[1]

[1] *Sea Robin Pipeline Company*, 87 FERC ¶ 61,384 (1999).

APPENDIX C

COMMISSION OPINIONS, ORDERS AND NOTICES

Docket Nos. CP95-168-002 and -000

SEA ROBIN PIPELINE COMPANY

Order on Remand

Issued June 30, 1999

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

This proceeding involves the petition by Sea Robin Pipeline Company (Sea Robin) to have its offshore natural gas pipeline system declared to be a non-jurisdictional gathering facility. On October 23, 1997, the United States Court of Appeals for the Fifth Circuit vacated and remanded the Commission's June 16, 1995 decision[1] that determined under the Commission's "primary function" test, Sea Robin's pipeline facilities are properly classified as jurisdictional transportation facilities, rather than nonjurisdictional gathering facilities as Sea Robin proposed.[2] On February 2, 1998,

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[1] *Sea Robin Pipeline Company*, 71 FERC ¶ 61,351 (1995), *reh'g denied*, 75 FERC ¶ 61,332 (1996).

[2] *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (Fifth Cir. 1997), *reh'g denied* (February 2, 1998). The Commission's basic test for determining the jurisdictional status of a pipeline facility is the "primary function" test. The "primary function" test was articulated by the Commission in *Farmland Industries, Inc.* (*Farmland*), 23 FERC ¶ 61,063 (1983). In Farmland, the Commission enumerated six physical criteria to be included in a jurisdictional analysis: 1) the length and diameter of the

the court denied the Commission's petition for rehearing and motion for clarification. The case is now before the Commission on remand from the Fifth Circuit for further consideration.

In its decision, the court ruled that the Commission failed to give adequate attention to the physical or operational characteristics of Sea Robin's system in applying the "primary function" test to determine its jurisdictional status.[3] The Court concluded that the Commission had decided that Sea Robin performed a transportation function solely on the basis of the single factor of the size and length of the system and had disregarded the rest of the factors of the primary function test.

The court stated that on remand, the Commission may again consider the applicability of the primary function test to offshore pipeline systems and, if necessary, reformulate the test.[4] The Court suggested that the Commission may choose to generically delete any of the *Farmland* criteria that the Commission believes to be nonprobative with respect to assessing the function of Outer Continental Shelf (OCS) facilities.[5]

The court offered no judgement as to the proper result. However, the Court did offer for the Commission's consideration an approach to classifying Sea Robin's facilities which would draw the jurisdictional line between gathering

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line; 2) the extension of the facility beyond the central point in the field; 3) the line's geographic configuration; 4) the location of compressors and processing plants; 5) the location of wells along all or part of the facility, and 6) the operating pressure of the lines. Over time, certain nonphysical criteria, such as the general business activity of the operator, were also utilized by the Commission.

[3] *Id.* at 369.

[4] *Id.* at 372.

[5] *Id.*

and transportation at a point internal to Sea Robin's overall system.[6] The Commission has reviewed its method of applying the primary function test offshore and has decided to follow the Court's suggested approach.[7] In addition, the Commission is reformulating certain aspects of its application of the primary function test to OCS facilities in light of the Fifth Circuit's decision.

The Commission's review has resulted in our concluding that the "behind-the-plant" factor is not necessarily determininative when the primary function test is applied to offshore facilities, and can be outweighed by other factors. In addition, the Commission will assess the physical configuration of offshore pipeline systems to determine if there exists a central location where gas is aggregated for further transportation to shore. The Commission will view such a location as being the offshore analogue of the onshore "central-point-in-the-field" criterion. Specifically, in cases in which a pipeline system is configured to deliver gas collected from upstream wells to a centralized location through several relatively small diameter lines for aggregation for further delivery onshore through a single larger diameter pipeline, that centralized aggregation location will be considered to be analogous to the central-point-in-the-field in the onshore context and will be given weight in identifying the

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[6] *Id.* at 371.

[7] The Commission notes that a determination that gathering ends at a point internal to Sea Robin's system is not a new concept. On June 25, 1996, Sea Robin filed a letter with the Commission's Secretary urging the Commission to find on rehearing of the June 16, 1995 declaratory order that "at a minimum Sea Robin's facilities at the upstream of the Vermillion platform . . . be declared to be non-jurisdictional gathering facilities under the NGA." After suggesting that Sea Robin may choose to "offer portions of its system as predominantly involved in a gathering or a transportation function," the Fifth Circuit pointed out that the Commission, without prejudice, declined to address Sea Robin's request because the request was not part of the original petition. 127 F 3d at 371.

demarcation point between gathering and transportation on OCS pipeline systems.

Taking the approach suggested by the Court and applying the primary function test as refined herein to Sea Robin's system, the Commission has determined that gathering on Sea Robin's facilities ends at a point internal to Sea Robin's existing certificated pipeline system at the Vermilion Block 149 Compressor Station.

I. The Primary Function Test

A. *Statutory Framework*

The basic purpose of Congress in enacting the NGA was to "occupy the field,"[8] of the regulation of natural gas moving in interstate commerce by the primary grant of jurisdiction to the Commission over those aspects of such regulation over which the states may not act.[9] Section 1(b) of the NGA embodies the primary grant of jurisdiction to the Commission. At the same time, Section 1(b) exempts from the Act's coverage "the production or gathering of natural gas." Thus, Section 1(b) first grants to the Commission broad plenary authority to regulate the business of transporting and of wholesaling natural gas moving in interstate commerce. Secondly, Section 1(b), by operation of the "production and gathering" exemption, removes from that plenary grant of federal jurisdiction those aspects of natural gas regulation which are the proper subject of state regulation.

However, the NGA does not define "production" or "gathering" and the Commission over the years has developed criteria by which it determines how facilities should be classified under these categories. Significantly, the NGA was enacted in 1938 at a time when there was no federal OCS and

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[8] *See Schneidwind v. ANR Pipeline Co.*, 485 U.S. 293, 310-311 (1988).

[9] *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947).

no OCS natural gas facilities. As a result, the Commission's policy regarding the jurisdictional status of production and gathering facilities had its initial evolution primarily in the context of onshore production and gathering.

Only in the last decade or so, has the Commission attempted to apply the primary function test[10] to determine the jurisdictional status of OCS facilities. Because of the physical characteristics particular to OCS facilities, application of several of the factors used in the primary function test onshore has been difficult to apply in the OCS environment. Wells are drilled and operated from production platforms offshore. Large platforms can accommodate up to 36 wells. Although gas may be treated, cost and engineering considerations generally preclude any processing of gas on offshore platforms for the extraction of liquefiable hydrocarbons. In short, the nature of OCS production and the movement of gas from the platform to consumers onshore does not make for a tight fit with the weight afforded the criteria historically applied by the Commission to onshore production and gathering. Accordingly, over the past decade the Commission has modified the application of the primary function test in a fashion that leads to results for OCS facilities that are functionally equivalent to the results obtained onshore. In this order, the Commission, under the guidance of the Court, is further refining its adaptation of the primary function test to the offshore environment.

B. *Evolution of the Application of the Primary Function Test to OCS Pipeline Facilities*

In 1989, in *EP Operating v. FERC* (*EP*),[11] the court reversed a Commission determination that a 51-mile long, 16-inch diameter OCS pipeline was a jurisdictional transportation facility. The 51-mile pipeline originated at a point over

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[10] *See* note 2, *supra.*

[11] 876 F. 2d 46 (Fifth Cir. 1989).

80 miles offshore at a floating production platform located in water depths of 1649 feet. Paramount among the factors the Commission had found to be indicative of transportation were the length, diameter, and operating pressure of the facility. The court found the length of the line in *EP* was solely a function of location, being "no more than the distance between the point of production and the nearest appropriate connection with an interstate pipeline."[12] In addition, the Court was persuaded by EP's assertion that no jurisdictional pipeline was willing to build a line out to the EP floating rig 80 miles from shore in 1,640 feet of water. Accordingly, the court found that the primary function of the EP line is gathering because "the . . . [EP line] is simply the most practical way to move the product from the seabed to a point nearer shore where it can be processed and introduced into a pipeline."[13] Commenting on the primary function test, the court noted that the test "involves a case-by-case consideration of all the facts and circumstances of the particular case rather than the application of any overarching bright line standards."[14]

In response to the *EP* decision, in 1989 the Commission set upon a review of its "gathering policy." This review culminated in the Commission's articulation and application of the "modified primary function" test in *Amerada Hess Corporation, et. al., (Amerada Hess)*.[15] As set out in *Amerada Hess*, the "modified primary function" test consists of the continued application of the "primary function" test as

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[12] *Id.* at 49.

[13] The court noted that while initially the EP line would be used only to transport gas produced and owned by the joint owners of the line, the line had significant excess capacity. The court stated that its decision "does not predict the effect that such changes in use might have on the primary function of the facility." *Id.* at 50.

[14] *Id.* At 48.

[15] 52 FERC ¶ 61,268 (1990).

articulated in *Farmland* with a modification in its application in accord with *EP*. Specifically, when applying the *Farmland* criteria, the Commission stated that it would consider, especially for offshore facilities, the changing technical and geographic nature of exploration and production. The order explained that because of recent advances in engineering and available technology, offshore drilling operations were moving further offshore and further from existing interstate pipeline interconnections. Accordingly, in applying the "modified primary function" test to OCS pipeline facilities the Commission stated that it would apply, in effect, a sliding scale that would allow for the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area.

From the adoption of the "modified primary function" test in 1990, until the Commission's 1995 decision in *Sea Robin Gas Pipeline Company (Sea Robin)*, the Commission had found only two OCS facilities were not exempt gathering facilities under the test.[16] The Commission's policy in applying the "modified primary function" test to offshore facilities resulted in finding, in virtually every case, that *all* offshore pipeline facilities that carry natural gas from well connections to offshore platforms, between offshore platforms, or away from offshore platforms to an interconnection with an interstate pipeline are non-jurisdictional gathering facilities. During this period, OCS pipeline facilities of increasing lengths and diameters, including existing interstate pipelines, as well as facilities in relatively shallow waters, were declared to be non-jurisdictional gathering facilities.

In 1995, in response to heightened interest in OCS exploration and development, the Commission through a notice of

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[16] *Tarpon*, 60 FERC ¶ 61,041 (1992); *Trunkline Gas Pipeline Company*, 67 FERC ¶ 61,256 (1994).

inquiry undertook a review of its OCS gathering policy. On February 28, 1996, the Commission issued a statement of policy respecting pipeline facilities on the OCS. [17] The policy statement concluded that facilities located in deep water (a depth of 200 meters or more) would be presumed to be gathering facilities up to the point where they reach proximity to, or the point or points of interconnection with, the existing interstate pipeline grid. Beyond that point, the facilities' primary function would be determined under the Commission's existing "primary function" test.

C. *Changes to the Existing OCS Primary Function Test*

As noted by the Fifth Circuit, where gas is destined for interstate commerce, there is necessarily a point at which the collection or gathering of gas ends, and interstate transmission begins.[18] Prior to the adoption of the primary function test which incorporated several earlier methodologies, the Commission had promulgated two principal "tests" to differentiate onshore facilities engaged in transportation, subject to the Commission's NGA jurisdiction, from facilities engaged in gathering, which are exempt from NGA regulation. The first test, the "behind-the-plant" test, was announced in *Phillips Petroleum Co.*[19] The "behind-the-plant" test presumes that all facilities located between the wellhead and a processing plant are nonjurisdictional gathering lines. All facilities located beyond the processing plant are presumptively transportation facilities. [20] At the time that

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[17] Docket No. RM96-5-000, *Statement of Policy*, 74 FERC ¶ 61,222 (1996).

[18] 127 F. 3d at 371.

[19] 10 FPC 246 (1951), *rev'd in part on other grounds sub nom. Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

[20] The concept that transportation begins only after processing comported with the Commission's then definition of the entities that Congress intended to be subject to regulation under the NGA, *i.e.*, "companies

it was developed, the "behind-the-plant" test was for the most part used where the gathering pipeline and processing facility were both owned by the gas seller, with the sale of the gas occurring after processing. The Commission was able to adequately protect consumer interests through its jurisdiction over the sale. [21]

For gas that requires no processing, the "central-point-in-the-field" test was applied. Under the "central-point-in-the-field" test, a mechanical determination is made whether gas from separate wells is collected by several lines which converge at a single location in the producing field for delivery into a single line, the separate lateral lines behind the central point being classified as non-jurisdictional gathering facilities.[22] The "central-point-in-the field" is often the point where the gas is compressed by the pipeline.

In the onshore context, the "behind-the-plant" and "central-point-in-the-field" concepts have been incorporated into the "primary function" test.

The Commission believes that offshore the "behind-the-plant" factor is not necessarily determinative and can be outweighed by other factors. In the onshore context, for economic reasons, the location of gas processing plants generally coincides with a centralized location so that at the point where the collected and processed gas leaves the

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whose main function was to transport natural gas through interstate pipelines and sell gas so transported at city gates for resale to ultimate consumers." *Columbian Fuel Corp.*, 2 FPC 200, 207 (1940). Because the Commission at that time did not believe it was required to regulate producer resales and since unprocessed gas is difficult to transport in long high pressure lines and cannot be sold at the city-gate for consumption, the processing plant was a logical effectuation of the gathering/ transportation function.

[21] *See, e.g., Buckeye-Tennessee Gas Gathering Co.*, 12 FERC ¶ 61,208 (1980).

[22] *See Barnes Transportation, Inc.*, 18 FPC 369, 372 (1957).

processing plant, all of the physical acts of production and gathering have been completed. Offshore, this coincidence of plant tailgate and centralized location in the field does not occur. Production-related economic, operational, and engineering factors preclude completion of gas processing close to the producing areas as occurs onshore. Cost, engineering and technological considerations limit the amount of production processing equipment that can be near OCS producing fields. These production-related factors dictate that only the most rudimentary separation and dehydration operations to prevent formation of water-hydrocarbon hydrates and permit efficient flow of the wellhead stream be conducted at sea. Accordingly, in assessing the jurisdictional status of offshore facilities, the "behind-the-plant" factor will not be afforded greater significance than the other factors of the primary function test.

In addition, where a pipeline system includes a facility where gas is delivered by several relatively small diameter lines for aggregation and preparation for further delivery onshore through a single larger diameter pipeline, the location of that collection facility will be afforded considerable weight for purposes of identifying the demarcation point between gathering and transportation on OCS systems. The Commission recognizes that not all OCS pipeline systems will exhibit a centralized aggregation point. For example, an OCS facility that has a straight-line or spine-and-lateral type configuration may not have such a point. The Commission will determine the jurisdictional status of such systems on the basis of the current formulation of the primary function test as modified in this order, as well as any additional refinements that the Commission may develop to further adapt the primary function test to the physical characteristics of moving natural gas across the OCS to shore.

II. Sea Robin's System Facilities

Sea Robin was formed as a joint venture owned by subsidiaries of United Gas Pipe Line Company (United) and

Southern Natural Gas Company (Southern) and operated by United.[23] Sea Robin was certificated in 1969[24] to transport gas in interstate commerce from the OCS for its then-affiliates, United and Southern. The system's initial purpose was to obtain gas supplies from production fields in the East Cameron, South Marsh Island, and Eugene Island areas of the Gulf of Mexico, and deliver them to United and Southern. United and Southern were Sea Robin's only sales customers. Subsequently, however, deliveries to United and Southern declined and Sea Robin abandoned its sales obligations to United and Southern and became a transportation-only pipeline on April 1, 1990.[25] Sea Robin's shippers today consist of producers and marketers which transport gas to Erath, Louisiana, or the Henry Hub in Louisiana for ultimate delivery to markets on interconnecting transmission pipeline systems.

Sea Robin's system and the production connected to it are located on the OCS in the Gulf of Mexico. The system consists of 438 miles of dual-phase pipelines and six compressors, all of which were constructed and have been operated pursuant to certificates of public convenience and necessity.[26] Sea Robin moves a raw stream of natural gas and

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[23] On December 13, 1990, Southern Offshore Pipeline Company, a subsidiary of Southern, purchased United's interest in Sea Robin. Presently Southern Deepwater Pipeline Company and Southern Offshore Pipeline Company each own 50 percent of Sea Robin, an unincorporated joint venture, and both of these companies are wholly owned subsidiaries of Southern.

[24] 41 FPC 237 (1969).

[25] Sea Robin became an open-access transporter under the provisions of Order No. 436, and on October 21, 1988, the Commission issued to Sea Robin its open-access blanket certificate. Sea Robin filed a revised tariff with the Commission in compliance with the provisions of Order No. 636 on December 31, 1992, in Docket No. RS92-79 and implemented operations under Order No. 636 on November 1, 1993.

[26] In 1969, when Sea Robin's original certificate was issued in Docket No. CP69-48, the Commission certificated a variety of pipelines with

liquid hydrocarbons, also referred to as condensate, which has not been separated or processed. Sea Robin collects this gas and liquid stream from numerous production fields offshore and carries the raw stream to shore for liquids separation, dehydration, processing, and delivery to five interconnecting transmission pipelines.[27] The system can carry in excess of 288 Bcf annually.

The system is configured in the form of an inverted or upside-down "Y." The size of the pipes constituting the system ranges from 4-inch diameter pipeline to 36-inch diameter pipeline. However, more than 77 percent of the system is composed of 20-inch and larger diameter pipeline.[28]

Sea Robin's system contains ninety-nine miles of 4-inch to 16-inch diameter laterals connecting 57 receipt points to the system. Generally, the receipt points are located on offshore

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diameters ranging from 8.625 inches to 36 inches. *Sea Robin*, 41 FPC 257 (1969). These facilities were considered necessary to construct an integrated interstate pipeline system capable of accessing and transporting OCS gas from multiple production areas. As Sea Robin's system grew to a capacity of 1.26 Bcf/day, the Commission certificated a variety of additional OCS facilities as part of Sea Robin's integrated system. New facilities were certificated to extend Sea Robin's transportation system with 10.75-inch, 12.75-inch, 20-inch, and 24-inch pipelines, [47 FPC 1486 (1972)], to expand its transportation system with 12.75-inch laterals at the same time expanding its 20-inch, 24-inch and 30-inch mainlines [58 FPC 898 (1977)], to loop its system with 30-inch pipeline to provide for additional deliverability [51 FPC 1221 (1974)], or simply to connect to producer platforms with 8.625-inch and 12-inch pipeline to permit "the transportation of natural gas in interstate commerce subject to the jurisdiction of the Commission" [42 FPC 929 (1969)].

[27] Columbia Gulf Transmission Company, Koch Gateway Pipeline Company, Sabine Pipeline Company, Southern Natural Gas Company, and Louisiana Resources Company (an intrastate pipeline).

[28] 40.7 miles of 20-inch diameter line; 106 miles of 24-inch diameter line; 23.1 miles of 26-inch diameter line; 102.9 miles of 30-inch diameter line; and 66.3 miles of 36-inch diameter line.

production platforms which provide for the interconnection of the production facilities to Sea Robin's system.[29] In addition to the 57 production platform receipt points, there are two Sea Robin-owned receipt points and laterals connected to Sting-ray Pipeline Company in West Cameron Blocks 563 and 586.

The longest segment of the system is the Vermilion 149-Erath segment, consisting of 66.3 miles of 36-inch pipeline running in a straight line from the Vermilion 149 compressor station, a manned platform, to onshore processing facilities. Through this segment, Sea Robin carries gas that has been moved by Sea Robin from 67 platforms and brought together, through the arms of the inverted "Y" configuration to the Vermilion 149 station at the fork of the "Y." The Vermilion 149 Station consists of two turbine compressor units of 12,350 horsepower each.[30] From the Vermilion 149 Station the gas is then carried in a straight line, 66.3 miles to shore, through a region where the Vermilion 149-Erath line picks up additional gas from four platforms, all of which are located along the first 25 miles of the 66.3 mile-long segment. The Vermilion-Erath line terminates at an onshore location near Erath, Louisiana, in Vermilion Parish, where the gas that has been carried through Sea Robin's system is delivered to two plants for separation, dehydration, and processing. Sea Robin does not have an ownership interest in either plant. The first

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[29] In instances where the interconnection between the production facilities and Sea Robin's facilities is not located on the platform then, generally, the interconnection is located at a subsea tap where Sea Robin's facilities and a third party's facilities intersect. These third party facilities consist of very short laterals which are primarily owned by producers; however, a few of these laterals upstream of Sea Robin's system are owned by interstate pipeline companies.

[30] At the time of the Commission's prior orders in this proceeding the Vermilion 149 Station housed three 12,500 hp compressors. On February 1, 1999, the Commission granted Sea Robin's request for authorization to abandon one of these compressors. *See* 86 FERC ¶ 61,093 (1999).

plant, a treatment facility, is operated by Pennzoil Petroleum Company. The second plant, a processing facility, is operated by Texaco Exploration and Production, Inc.

After leaving the plants, the gas travels approximately 1.8 miles downstream to Sea Robin's Erath Compressor Station (Erath Station). The compression at Erath is stated to be necessary because the pipeline's pressure is too low after reaching shore and moving through the processing plants to enter the transmission pipeline systems.

Sea Robin delivers gas on behalf of the various shippers on its system to four interstate pipeline companies at five interconnecting delivery points onshore. Four of the delivery points are located at the terminus of the Sea Robin system on the Erath Station site. However, the Sabine delivery point is located immediately upstream of the Erath Station. Gas delivered at the Sabine Delivery Point typically goes to the Henry Hub which is less than one mile from the processing plants and the Erath Station.

III. Discussion

When all the relevant circumstances relating to an offshore pipeline system are considered, the conclusion may be that a portion of the facilities of the system is engaged in gathering, while another portion is engaged in jurisdictional transportation.[31] After reconsidering the totality of the circumstances of Sea Robin's system in light of the Fifth Circuit's opinion, the Commission believes that Sea Robin is primarily engaged in jurisdictional transportation over the portion of its system described by Sea Robin as its "longest segment."[32] That longest segment is the Vermilion 149-Erath Line, consisting of 66.3 miles of 36-inch pipeline running in a

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[31] 127 F 3d at 371; *Panhandle Eastern Pipe Line Company*, 52 FERC ¶ 61,268, at pp. 62,012-13 (1990).

[32] Petition at 15.

straight line from the Vermilion 149 Compressor Station to the onshore. Through that large diameter segment, Sea Robin transports gas that has previously been taken by Sea Robin from 67 platforms and then brought together, through the arms of Sea Robin's inverted "Y" configuration, to the Vermilion 149 Station, located at the fork of the "Y."

From the centralized collection point, the gas is transported in a straight line, 66 miles to shore, through a region with few platforms. Although the entire Vermilion-Erath Line is located upstream of the processing plants, that fact, taken alone, is not determinative in assessing the primary function of a major OCS line like Sea Robin. Due to the geographic and technical characteristics of production and transportation on the OCS, it is not feasible to construct a major processing plant closer to the production areas.

In addition to the marked change in physical attributes and geographic configuration exhibited by Sea Robin's facilities occurring at Vermilion Block 149, the straight-shot geographical configuration of Sea Robin's system downstream of the Vermilion 149 Station interconnecting with only two laterals delivering gas from only four wells along its 66.3-mile length, in and of itself, is a further indication of a transportation function.

Another element of the primary function analysis indicative of the transmission function of the Vermilion 149 to Erath Line is the location and concentration of significant compression at Vermilion 149. At the Vermilion 149 Station, the gas can be compressed by two 12,500 hp compressors for further transportation. Sea Robin's Vermilion Block 149 compression is typical of compression found on large diameter transportation lines transporting high volumes of gas over relatively long distances. This compression is not field compression and is not needed to deliver gas from OCS production platforms into Sea Robin's system. Rather, these compressors stand ready to assist in transporting large

volumes of gas relatively long distances from that centralized collection point, through a large diameter pipeline in a straight line, over 66 miles to shore, through a region with few platforms. Sea Robin explains that compression at the Vermilion 149 Station may be needed "because of the physics of transporting large volumes of gas, along with condensate, through a dual-phase pipeline system for substantial distances." Sea Robin's explanation of the purpose of the Vermilion 149 Station further demonstrates that the Vermilion to Erath Line is engaged primarily in transportation. The location of compressors often serves as an indicator of transportation because, as on Sea Robin's system, compression is usually required to transport large volumes of gas over substantial distances. Sea Robin points out that offshore gathering frequently occurs at high pressures "since gas on the OCS is produced at high pressures." That point is true but irrelevant when compression is added at a central point in order to make possible further transportation "for substantial distances." The location of the two compressors at the Vermilion 149 Station is an additional factor indicating that transportation is the primary function of Sea Robin's facilities downstream of that point.

Moreover, aside from the fact that the overall configuration of Sea Robin's system exhibits a clear demarcation point between the collection and transmission functions, the Commission can not ignore the physical dimensions of the Vermilion 149 to Erath Line. While the court in *Sea Robin* viewed the Commission's prior orders to be based primarily on the size of Sea Robin's facilities, the court did not rule that the length and diameter are not relevant in determining the jurisdictional status of an OCS pipeline facility. The 36-inch diameter and 66.3 mile-length of the Vermilion 149 to Erath Line are dimensions typically associated with a transmission function and in this case are factors which, when considered with the other factors are indicative of a transmission

function, *i.e.*, geographical configuration, concentration and purpose of compression, presence of a centralized aggregation location, the abrupt change in physical characteristics at the Vermilion 149 Compressor Station, and the paucity of well connections along the 66.3 mile run through relatively shallow OCS waters, have caused the Commission to conclude that the primary function of the Vermilion 149 Compressor Station and the Vermilion 149 to Erath Line are jurisdictional facilities under the NGA.

In sum, the Vermilion 149 Station, a platform where Sea Robin performs compression and delivers the gas into the Vermilion-Erath line, is a central aggregation point that demarcates the end of the gas collection process on Sea Robin's system. Upstream of the Vermilion 149 Station, along the two arms of Sea Robin's inverted "Y," there are 45 laterals of diameters ranging between 4.5-inches and 24-inches that are connected to 67 production platforms. By the time the gas has reached the Vermilion 149 Station, the collection process has been virtually completed. Gas from only four platforms enters the Sea Robin system downstream of the Vermilion 149 Station. The introduction of gas from only a few producing locations downstream of the centralized collection point at Vermilion 149 does not change the primary function of the Vermilion to Erath Line, which is predominantly that of transportation.[33]

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[33] The Commission has historically acknowledged that because in a given case the production and gathering process may be "indivisible," a facility may perform more than one function. *See Continental Oil Company*, 16 FPC 1 at 7 (1956). In such circumstances, the Commission has found the law to be clear, *i.e.*, "where by an affirmative grant of power the statute gives the Commission jurisdiction over particular facilities, the fact that those facilities may also perform some function exempted from Commission power by another provision of the act does not suffice to remove the facilities from Commission control." *Id.* at 8. With this premise in mind, the Commission designed the "primary function" test to take account of the possible dual-role that a gas facility may play in the

In its petition, Sea Robin argues that the "central-point-in-the-field" test is of only "limited" relevance for offshore facilities. In fact, the central aggregation location configuration we have identified herein is significant for a facility like Sea Robin's that brings gas from many platforms to a single central point where it is aggregated and compressed for further transportation to shore through a single, longer and larger diameter line. In some offshore cases, the Commission has found the central-point-in-the-field to be of limited importance "with regard to isolated OCS operations" because the "central point" is the production platform and "production platforms are unitary structures." [34] However, those cases have little significance when gas has been brought from many such platforms to a central aggregation point for compression and further transportation.

Sea Robin also tries to minimize the significance of the central point in its configuration by arguing that there is no "true" central point when the system is configured like an inverted "Y." For that proposition, Sea Robin relies primarily on the Commission's decision in *Pelican Interstate Pipeline Co., (Pelican)*[35] In *Pelican,* however, the gas "entered the system at various locations along its entire length,[36] and

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production and gathering process. As the Commission stated in the seminal case where the "primary function" test was first articulated, "the consideration of decisive importance, in our view, is whether the company is engaged predominately in the transportation of gas in interstate commerce, as compared to other functions it may carry out." *Ben Bolt Gathering Company*, 26 FPC 825 at 827 (1961). In short, it is not necessary to find that the function of a particular facility is exclusively transportation or gathering to make a jurisdictional determination. Rather, the test is a determination of the *primary* function of the facility.

[34] *Superior Offshore Pipeline Company (SOPCO)*, 67 FERC ¶ 61,253, at p. 61,835 (1994).

[35] 61 FERC ¶ 61,025 (1992).

[36] *Id.* at p. 61,128 (1992).

Pelican provided no compression. There was thus no central point where the gas collection ended and transportation began.[37]

At bottom, the fundamental purpose of the sum of all of the factors that have been applied under the rubric of the "primary function" test is not to show how long a pipeline segment is, or to designate a name for a generalized type of physical configuration, or to count compressors, *etc.* "Although a variety of labels have been applied to these factors, *the ultimate test* is whether the primary function of the facility can be classified as transportation or gathering."[38] Thus, in determining whether the NGA Section 1(b) gathering exemption applies, "the Commission must make a factual determination whether a [facility's] primary function consists of the interstate transportation of gas or some other activity." If the purpose of the facility can be categorized as being primarily the collection of gas, its principal or primary function is gathering. If, on the other hand, the principal or primary function of the facility is to move gas away from the location where the collection process is completed, its

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[37] Similarly, in *SOPCO*, *supra* at p. 61,836 and *Green Canyon Pipe Line Company*, 59 FERC ¶ 61,109, at p. 61,411 (1992), there was no central point to which gas was collected for compression by the pipeline. Indeed, in *SOPCO*, the pipeline did not provide compression at all and was operated at natural wellhead pressure. In Green Canyon, the "Y"-shaped system "consisted of four lines which connected several OCS production platforms, and formed a network feeding into Transco's gathering system." The Green Canyon system was a "network configuration" (59 FERC at p. 61,411) located behind Transco's gathering lines. In *SOPCO*, the two arms of the "Y" connected at the onshore processing plant, and wells were "located throughout the producing areas where SOPCO gathers gas" (67 FERC at p. 61,835).

[38] *Farmland Industries*, 23 FERC at p. 61,143. *See also, EP, supra.* "The true test of primary function is whether, with reference to the specific facts and circumstances of this particular line, its primary function is gathering." 876 F.2d at 49.

primary function is transportation. In the case of Sea Robin's system, the application of this fundamental concept leads us to the conclusion that Sea Robin's pipeline facilities comprise two distinct components: a collection, or gathering component, upstream of the Vermilion 149 Platform, and a transportation component downstream of that point. In the most fundamental meaning of the "primary function" test, the "totality of the circumstances" demonstrates that the primary function of the Vermilion-Erath Line is to transport to shore natural gas that has been delivered from many areas through a network-like configuration of relatively smaller diameter lines to a centralized point where the gas is aggregated and compressed.

The Commission orders:

(A) The petition for declaratory order filed by Sea Robin in Docket No. CP95-168-000 is granted in part and denied in part.

(B) The certificates of public convenience and necessity issued to Sea Robin are rescinded to the extent necessary to reflect the jurisdictional findings discussed in the body of this order.

(C) Within 30 days from the date of issuance of this order, Sea Robin shall file tariff sheets specifying separately stated gathering rates, not inconsistent with the terms and conditions of its Part 284 tariff provisions, for gathering services performed through facilities located upstream of the Vermilion 149 compressor station.

Commissioners Bailey and Hébert dissented with separate statements attached.

Vicky A. BAILEY, Commissioner, *dissenting*.

I respectfully dissent from today's decision. I would now grant Sea Robin's petition and find its offshore facilities to be a non-jurisdictional gathering system. My conclusion reflects the evolution of my own thinking subsequent to both the issuance of the Commission's OCS Policy Statement in 1996 and our earlier decisions in this Sea Robin proceeding. (See my dissenting statement in *Shell Gas Pipeline Company*, 78 FERC ¶ 61,192 (1997).

I respect the effort made in this order to reformulate the application of the primary function test to OCS facilities. But each new case will present distinquising [sic] fact patterns, and the Commission will continue to be faced with the dilemma of which aspects of the primary function test should be given greater weight. In the end, I fear that we will continue to have a mixed group of gathering and transmission lines on the OCS, and that the jurisdictional status of certain of those lines will be based solely upon different applications of the primary function test. My experience when we decided the earlier Sea Robin case convinces me that, no matter how great an effort we make, any jurisdictional decision we issue in this area is subject to challenge because it is easy to find conflicting Commission precedent.

I remain convinced that the movement of gas across the OCS is often a collection process. Without a statutory definition of gathering, I find the analysis set forth in *EP Operating Company v. FERC*, 876 F.2d 46 (Fifth Cir. 1989) to be controlling. Deeper water production will mean even longer and wider lines to move the production to market, but that does not change the function away from gathering to transmission. I recognize that the preservation of FERC/NGA jurisdiction affords protections in the face of potential complaints, but, as the Sea Robin court observed: 'Need for regulation cannot alone create authority to regulate.'

As noted in my *Shell* dissent, the antidiscrimination provisions of the Outer Continental Shelf Lands Act (OCSLA) are real. This Commission has acknowledged its jurisdiction pursuant to that statute and would respond promptly to complaints. Ultimately, if an unduly discriminatory rate is found to be without remedy under the OSCLA, a legislative solution would be a viable option if that need were demonstrated.

In sum, I am not persuaded that today's order provides a workable approach to OCS jurisdictional determinations. I believe, as a practical matter, that the movement of most gas across the OCS is primarily a gathering function.

Curt HÉBERT, Jr., Commissioner, *dissenting*.

This proceeding began in 1995 when the Sea Robin Pipeline Company (Sea Robin) filed a petition with the Commission for a declaratory order seeking a finding that its pipeline facilities were gathering facilities exempt from the Commission's Natural Gas Act (NGA) jurisdiction under Section 1(b) of the Act. The subsequent denial of the underlying petition and request for rehearing led to an appeal to the United States Court of Appeals for the Fifth Circuit. The order on remand is the majority's response to the Circuit Court's decision to vacate the previous Commission orders on this issue and remand the case to the Commission for further consideration.

The Circuit Court's remand seems to be largely centered on the Court's finding that "the Commission abandoned, without reasoned consideration, its 'sliding scale' of *Amerada Hess* . . . " and "Instead, the Commission reverted to its single factor, bright-line approaches that it had previously rejected as unworkable for offshore pipelines. *See Northwest Pipeline Corp.*, (noting that a reasoned analysis of the primary function test must eschew the application of any overarching bright line standards); *EP Operating Co.*" (citations omitted).[1]

In addition to the Court's concern that the Commission had not supplied a reasoned decisions for its departure from previous decisions on matters regarding the outer continental shelf, the Court indicated that perhaps certain elements of the primary function test were not appropriately applied to this petition, or that certain elements might no longer be "relevant to the physical, geographical and operational characteristics

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[1] *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, at 370 (Fifth Cir. 1997), *reh'g denied* (February 2, 1998).

of pipelines in the OCS"[2] and that the primary function test should be reformulated to address the unique challenges presented by facilities on the offshore.

On remand, the majority appears to take advantage of the opportunity to reformulate the primary function test stating that, the Commissions' finding will be based on "reconsidering the totality of the circumstances." and its analysis of physical characteristics of the Sea Robin system.[3] Based on this analysis the Commission finds Sea Robin to be engaged in jurisdictional transportation on the Vermilion 149-Erath Line.

However, while the order on remand asserts that the analysis is based on the "totality of the circumstances," closer inspection reveals that the proposed reformulation gives certain weight to various factors such as the central-point-in-the-field thereby presenting yet another jurisdictional test for this arena.

While the history of this issue predates my participation, I am informed by the impact of the various Commission reformulations of its tests to determine gathering, particularly the impact of the 1996 Policy Statement[4] which elevated the proximity of a line to jurisdictional facilities beyond other elements of the primary function test resulting, realistically, in a one-sided determination in favor of jurisdiction.

After reviewing the history of this issue, and the Commission's evolving responses to the challenges of the OCS issues, I am assured that the precedent of *EP Operating*[5] remains the appropriate legal benchmark for these proceedings. Under the Court's guidance in *EP Operating* there

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[2] *Id.* at 371.

[3] Mimeo at p. 12.

[4] Docket No. RM96-5-000, *Statement of Policy*, 74 FERC ¶ 61,222 (1996).

[5] *EP Operating Co. v. FERC*, 876 F.2d 46 (Fifth Cir. 1989).

is a recognition that "[t]he true test of primary function is whether, with reference to the specific facts and circumstances of this particular line, its primary function is gathering."[6] This test is seen then within the reflection of the fact that due to the very nature of gas production on the OCS, facts such as the length of the line "is no more that the distance between the point of production and the nearest appropriate connection with an interstate pipeline."[7] I find this statement to comport with my belief that the longer lengths, larger diameters and higher operating pressures typical of offshore pipelines need to be recognized in a primary function analysis.

In the Commission Notice of Inquiry on Alternative Methods for Regulating Natural Gas Pipeline Facilities and Services on the Outer Continental Shelf,[8] the Commission asked for assistance in responding to the court's direction in *Sea Robin*, and the Commission specifically asked how it could simplify the process of making OCS jurisdictional determinations. I do not view the use of the *EP Operating* holding as a simplification, but as guidance that is clearer than the various reformulations of the modified primary function test which fail to provide any clear guidance on this issue. Unfortunately, the majority's action on the remand does not provide the OCS issue with the clarity and simplicity that the Commission indicated it was looking for when it issued the 1998 Notice of Inquiry. Instead, I believe that the actions today add another level of complexity and uncertainty to an already complicated arena.

Accordingly, my preference would be to utilize the *EP Operating* precedent as the most appropriate approach to a jurisdictional determination of this system.

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[6] *Id.* at 49.

[7] *Id.* at 49.

[8] 83 FERC ¶ 61,235 (1998).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

[Filed Oct 22 2002]

No. 00-1355

EXXONMOBIL GAS MARKETING COMPANY,
A DIVISION OF EXXON MOBIL CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ANR PIPELINE COMPANY, *et al.*,
Intervenors

Consolidated with 00-1357, 00-1361,
00-1363, 00-1364, 00-1365

Before: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, * Randolph, Rogers, Tatel, and Garland, * Circuit Judges

ORDER

Upon consideration of petitioners ExxonMobil Gas Marketing, Co, BP America Production Co, Bp Energy Co.,

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* Circuit Judges Henderson and Garland did not participate in this matter.

an Texaco Natural Gas Inc.'s petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: MICHAEL C. MCGRAIL
Michael C. McGrail
Deputy Clerk

APPENDIX E

15 U.S.C. § 717. Regulation of natural gas companies

* * * *

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * *

(June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36; Oct. 24, 1992, Pub.L. 102-486, Title IV, § 404(a)(1), 106 Stat. 2879.)

15 U.S.C. § 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference

or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural- gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to

show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the

permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may

issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or

will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for,

the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 21, 1938, c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Stat. 459; Nov. 9, 1978, Pub.L. 95-617, Title VI, § 608, 92 Stat. 3173; Oct. 6, 1988, Pub.L. 100-474, § 2, 102 Stat. 2302.)

BEST AVAILABLE COPY

LOUISIANA

ERATH DELIVERY POINTS

SOUTHERN NATURAL GAS CO.	000000
NGPL GATEWAY PIPELINE CO.	004708
COLUMBIA GULF TRANSMISSION CO.	004711
LOUISIANA RESOURCES CO.	004713
SABINE PIPELINE CO.	006163

CAMERON
VERMILION
IBERIA
ST. MARY
ST. MARTIN
WEST CAMERON AREA
EAST CAMERON AREA
VERMILION AREA
SOUTH MARSH ISLAND AREA NORTH ADDITION
SOUTH MARSH ISLAND AREA
EUGENE ISLAND AREA
SHIP SHOAL AREA
RABBIT ISLAND DOME AREA
WEST CAMERON AREA SOUTH ADDITION
EAST CAMERON AREA SOUTH ADDITION
VERMILION AREA SOUTH ADDITION
SOUTH MARSH ISLAND AREA SOUTH ADDITION
EUGENE ISLAND AREA SOUTH ADDITION
GARDEN BANKS AREA
GREEN CANYON AREA
Gulf of Mexico

RECEIPT POINTS

POINT	BLOCK	POINT CODE
A	SS-238A	004733
B	SS-238B	004744
C	S-268	004748
D	S-191/192	006834
E	S-1060	004738
F	S-1062	004745
G	S-268	004731
H	S-210	004746
I	S-268C	004739
J	S-240	004732
K	S-268A	004788
L	S-270	004764
M	S-261A	004737
N	S-185	004739
O	S-266	006835
P	S-313	006836
Q	S-268A	004749
R	S-268B	004747
S	S-268C	004741
T	S-268D	005168
U	S-268A	004754
V	S-327	004771
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Y	SS-57	004739
Z	SS-58	005165
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DD	SS-139	004766
EE	SS-141	004768
FF	SS-142	006869
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HH	SS-165	004767
II	SS-166	004769
JJ	SS-238	004750
KK	V-62	006897
LL	SS-164	
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OO	V-142	005112
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VV	SS-239A	004761
WW	SS-240	004762
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YY	SS-240B	004764
ZZ	SS-241	004765
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EEE	SS-246	004770
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HHH	SS-249	004773
III	SS-250	004774
JJJ	SS-251	004775
KKK	SS-252	004776
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FFFF	SS-273	004797
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YYYYYYYYYYY	SS-474	004998
ZZZZZZZZZZZ	SS-475	004999

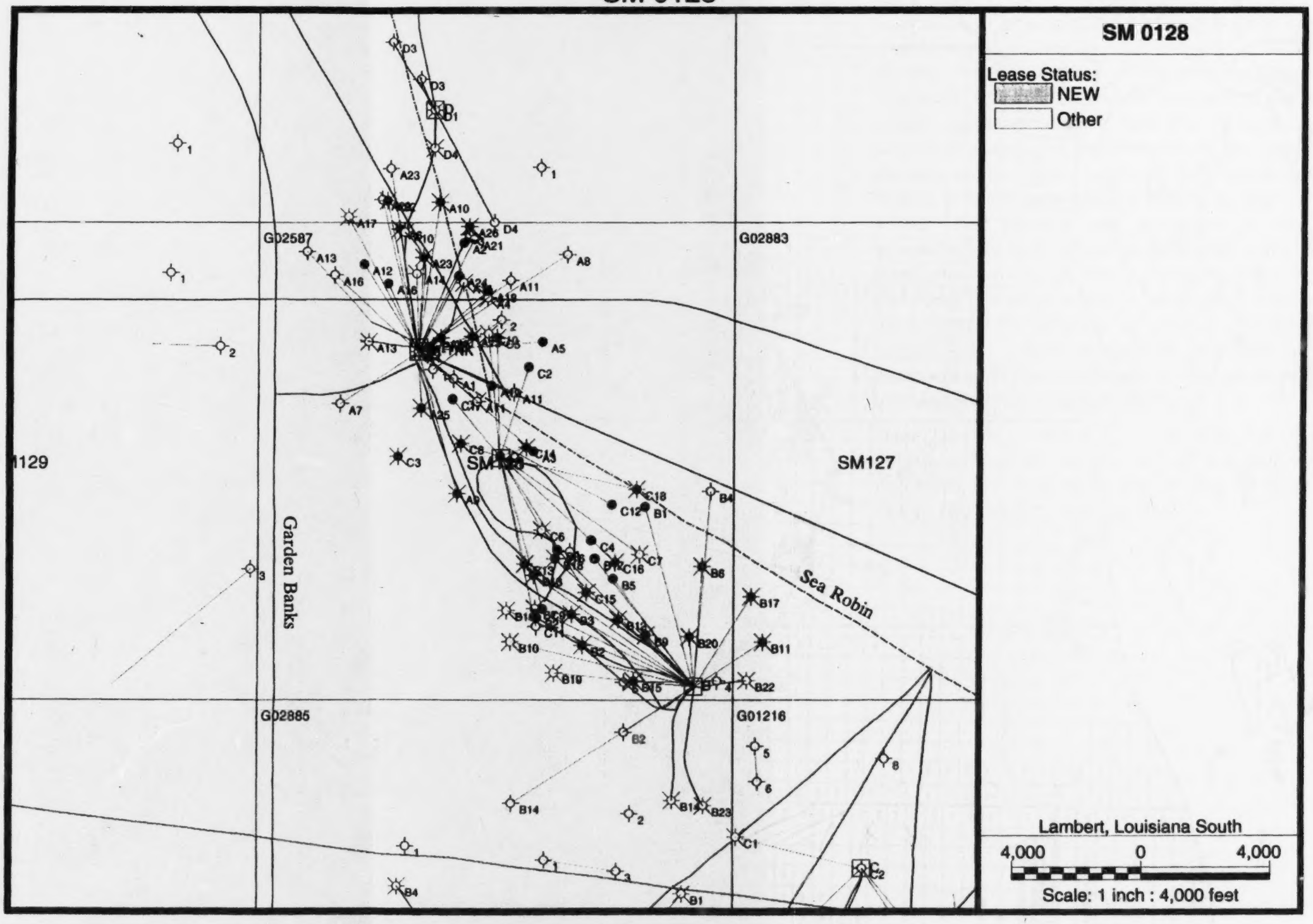
SEA ROBIN PIPELINE
A SONAT COMPANY
GENERAL SYSTEM MAP

LEGEND
- SEA ROBIN PIPELINES
- OTHER PIPELINES
- SEA ROBIN PLATFORM
- OTHER PLATFORM
- COMPRESSOR STATION

SCALE IN MILES

ENGINEERING DEPARTMENT NOVEMBER 6, 1986

SM 0128



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Supreme Court, U.S.
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Nos. 02-1215 and 02-1265

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SEA ROBIN PIPELINE COMPANY IN OPPOSITION

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QUESTION PRESENTED

Where the Federal Energy Regulatory Commission ("FERC") does in fact regulate Respondent Sea Robin Pipeline Company's rates under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d (2000), and where FERC approved a rate settlement between Sea Robin and the parties below (including most Petitioners) which is binding on *all* parties, are these cases unripe, or moot?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent Sea Robin Pipeline Company states that it is a wholly owned subsidiary of CMS Energy Corporation, a publicly traded company. The only other affiliates of Sea Robin Pipeline Company which have issued shares or debt securities to the public are Consumers Energy Company and Panhandle Eastern Pipe Line Company.

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IN THE

Supreme Court of the United States

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Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT SEA ROBIN PIPELINE COMPANY IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes included in the Petitions, these cases also involved Section 5 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717d (2000), and a provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 (2000). They are reproduced in the Appendix.

STATEMENT

The facilities of Respondent Sea Robin Pipeline Company ("Sea Robin") are at issue in these cases. Both Petitions proceed from a fundamentally mistaken premise. Consequently, a comprehensive brief in opposition is unnecessary.

REASONS FOR DENYING THE WRIT

1. Both Petitions claim that Respondent Federal Energy Regulatory Commission ("FERC"), as a result of its various orders below, does not assert rate regulation over Sea Robin's offshore production and gathering facilities under the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (2000)("NGA"). *See, e.g.*, Petition of The Producers Coalition in No. 02-1215 at 9 ("By withdrawing important federal safeguards that protect captive [Outer Continental Shelf] gas producers against the exercise of monopoly power by OCS pipelines, the FERC's orders at issue undermine Congress' purpose to afford consumers of interstate gas services a "complete, permanent and effective bond of protection from excessive rates and charges [footnote omitted]"); *see also id.* at 15; *see* Petition of ExxonMobil Marketing Company, *et al.* in No. 02-1265 ("ExxonMobil Pet." at 10, 28) ("Moreover, the only purpose for which pipelines like Sea Robin seek reclassification is to avoid rate regulation."). Both Petitions therefore seek this Court's review because they complain that the effect of FERC's orders, as affirmed by the Court of Appeals, deprives them of statutory rate protection under the NGA.

2. However, in an order dated February 15, 2001 in Docket No. CP95-168-005, FERC held that Sea Robin's offshore facilities *are* subject to Sections 4 and 5 of the NGA, 15 U.S.C §§ 717c and 717d (2000). *Sea Robin Pipeline Co.*, 94 F.E.R.C. ¶ 61,137 (2001).[1] That order is final, was not appealed by any party, is no longer appealable, and was not cited in either Petition. Accordingly, Sea Robin's offshore

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[1] *See* FERC's June 30, 1999 Order on Remand from the decision of the Fifth Circuit Ordering ¶ (C)(ExxonMobil Pet. at 93a), subjecting Sea Robin's Outer Continental Shelf ("OCS") facilities to NGA rate regulation and requiring Sea Robin to file tariffs reflecting its offshore gathering rates. It was that Ordering ¶ (C) paragraph that led to the February 15, 2001 FERC order and resulting settlement agreement process described in ¶¶ 2 and 3 of this Brief.

facilities are considered by FERC to be subject to the very rate-regulatory provisions of the NGA to which Petitioners would have this Court subject them.

3. Even more remarkably, Petitioners (or their affiliated or predecessor interests) and Sea Robin subsequently entered into a settlement agreement, approved by FERC, agreeing to rates with respect to Sea Robin's gathering facilities, to implement FERC's February 15, 2001 order discussed *supra* in ¶ 2. *Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 61,263 (2002), *approving Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 63,023 (2002); *see id.* at n.2 (listing parties to settlement agreement, including Petitioners). The existence of that settlement agreement, and the fact that Petitioners (or their related interests) are subject to it, also were not disclosed in either Petition. All parties below are bound by the settlement agreement. Those facts also make moot ExxonMobil's second question presented, for if Sea Robin's offshore facilities are, indeed, subject to rate regulation under the NGA, whether or not FERC earlier should have required Sea Robin to obtain abandonment authority under the NGA for the subject facilities is of no consequence to Petitioners, at least so long as Sea Robin continues to own them.

4. The arcane issues raised in the Petitions are of only academic interest in the context of these cases, and need not be addressed. Sea Robin agrees with the opinion of the majority of the United States Court of Appeals for the D.C. Circuit below (*see* ExxonMobil Pet. at 1a-27a), and therefore considers it unnecessary to respond in detail to Petitioners' arguments on the merits. Suffice to say that the D.C. Circuit majority applied this Court's opinion in *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90 (1963), in a manner that is faithful to its holding. *See, e.g.*, ExxonMobil Pet. at 20a. If this Court were to reach the merits, the majority decision of the D.C. Circuit should be affirmed. If the Court were to reach the merits, it would

conclude, we respectfully submit, as the D.C. Circuit and the Fifth Circuit essentially concluded, that the issues under Section 1(b) of the NGA are intensely factual and *sui generis*. Therefore, any decision on the merits would necessarily follow *Northern Natural*, because it followed the statute, and would thus be of limited additional precedential value.

5. Petitioners would also have this Court grant the writ because of the alleged importance to production of gas on the Outer Continental Shelf of a ruling whether OCS facilities are subject to NGA rate regulation. But this claim is a vast overstatement. FERC has elsewhere found that 50 percent of OCS gas is not subject to the NGA in any event, because it is owned by entities like Petitioners rather than by entities such as Sea Robin. *Regulations Under the Outer Continental Shelf Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, Order No. 639, F.E.R.C. Stats. & Regs. Regs. Preambles [1996-2000] ¶ 31, 097, *order on reh'g*, Order No. 639-A, F.E.R.C. Stats. & Regs. Regs. Preambles [19976-2000] ¶31,103 (2000) at p. 31,674, *order denying clarification*, 93 F.E.R.C. ¶ 61,274 (2000), *vacated and enjoined, Chevron U.S.A. Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), *appeal docketed sub nom. The Williams Cos. V. FERC*, No. 02-5056 (D.C. Cir., Feb. 5, 2002).[2]

6. Accordingly, the issues raised in both Petitions are unripe, or moot, because their fundamental premise, that Sea Robin's offshore facilities are *not* subject to rate regulation

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[2] But in any event Petitioners' claim of importance is incorrect, because any OCS facility not subject to NGA rate regulation is subject to the anti-discrimination provision of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1334 (2000), a point not discussed in the Petition in No. 02-1215, and alluded to only obliquely in ExxonMobil's Pet. at 28a. Even though FERC's OCSLA regulations are stayed (*see supra* ¶5), FERC retains statutory authority under the OCSLA and could regulate on a case-by-case basis. Thus, there is no "regulatory gap" created by the decisions at issue.

under the NGA, is mistaken. In any event, the majority decision of the D.C. Circuit was correct.

CONCLUSION

For the reasons stated herein, these cases are not appropriate for review by this Court, and the Petitions should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

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15 USCS § 717c (2003)

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§ 717c. Rates and charges

(a) Just and reasonable rates and charges. All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited. No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules. Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the

classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission. Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go

into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

APPENDIX B

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

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15 USCS § 717d (2003)

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§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates. Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract, affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation. The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and

determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

APPENDIX C

TITLE 43. PUBLIC LANDS
CHAPTER 29. SUBMERGED LANDS
OUTER CONTINENTAL SHELF LANDS

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43 USCS § 1334 (2003)

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§ 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations. The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this Act. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary

under this subsection shall include, but not be limited to, provisions—

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been

under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oil spill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before the date of enactment of this subparagraph [enacted Sept. 18, 1978], such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.), to the extent that activities authorized under this Act significantly affect the air quality of any State.

(b) Compliance with regulations as condition for issuance, continuation, assignment, or other transfer of leases. The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act.

(c) Cancellation of nonproducing lease. Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this Act, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(d) Cancellation of producing lease. Whenever the owner of any producting lease fails to comply with any of the provisions of this Act, of the lease, or of the regulations issued under this Act, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this Act.

(e) Pipeline rights of way; forfeiture of grant. Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by

the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 21(b) of this Act [43 USCS § 1347(b)]) assuring maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this Act.

(f) Competitive principles governing pipeline operation.

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of

throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after the date of enactment of this subparagraph [enacted Sept. 18, 1978]. This subparagraph shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

(g) Rates of production.

(1) The leasee [lessee] shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

(h) Federal action affecting outer Continental Shelf; notification; recommended changes. The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

(i) Flaring of natural gas. After the date of enactment of this section [enacted Sept. 18, 1978], no holder of any oil and gas lease issued or maintained pursuant to this Act shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.

(j) Cooperative development of common hydrocarbon-bearing areas.

(1) Findings. [(A)] The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including—

(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;

(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

(2) Prevention of harmful effects. The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.

Supreme Court, U.S.
FILED
MAY 30 2003
CLERK

No. 02-1215 and 02-1265

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

EXXONMOBIL GAS MARKETING COMPANY,
A DIVISION OF EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P. IN OPPOSITION

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May 30, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether, consistent with this Court's *Chevron* principles, the Court of Appeals for the District of Columbia Circuit properly affirmed orders of the Federal Energy Regulatory Commission which ruled that certain offshore natural gas facilities are "gathering" facilities exempt from the Commission's jurisdiction under section 1(b) of the Natural Gas Act.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the rules of this Court, Respondent Williams Gas Processing-Gulf Coast Company, L.P. ("Williams") states that its direct and indirect parent companies are:

The Williams Companies, Inc.
Williams Energy Services, LLC
Williams Field Services Group, Inc.
Williams Field Services Company
WGP Enterprises, Inc.

Williams states that the only publicly held company that owns 10% or more of its stock is The Williams Companies, Inc.

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IN THE

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No. 02-1215

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Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P. IN OPPOSITION

Respondent Williams Gas Processing-Gulf Coast Company, L.P. ("Williams") respectfully requests that this Court deny the above-captioned petitions for writs of certiorari,

which seek review of *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) ("*ExxonMobil*"). Williams, an intervenor in the proceedings below, owns and operates natural gas gathering and processing facilities on the Outer Continental Shelf ("OCS") of the Gulf of Mexico. In *ExxonMobil*, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") upheld orders of the Federal Energy Regulatory Commission ("FERC" or the "Commission") ruling that certain OCS facilities owned by Respondent Sea Robin Pipeline Company ("Sea Robin") are natural gas "gathering" facilities, which are exempt from FERC's jurisdiction pursuant to section 1(b) of the Natural Gas Act ("NGA"). 15 U.S.C. § 717(b). Petitioners assert that the orders affirmed in *ExxonMobil* reflect an impermissible interpretation of the NGA's gathering exemption. Williams respectfully submits that the D.C. Circuit properly applied the two-step analysis prescribed by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in ruling that FERC's interpretation of NGA section 1(b) is reasonable. Accordingly, review by this Court is unwarranted.

SUMMARY

The central theme of the petitions is that the classification of various of Sea Robin's OCS facilities as exempt "gathering" leaves Sea Robin as an unconstrained monopolist on the OCS and, thus, review of *ExxonMobil* is warranted to protect consumers from unregulated rates on OCS pipelines. But Petitioners fail to mention the most important fact: in *ExxonMobil*, FERC did *not* relinquish jurisdiction over *any rates* on *any* OCS pipeline.

Thus, after *ExxonMobil*, just as before, FERC continues to exercise plenary rate jurisdiction over Sea Robin's entire pipeline system, including the "gathering" facilities at issue here, because Sea Robin remains a "natural gas company" under the NGA. In final, nonappealable rate determinations,

FERC ordered Sea Robin to file gathering rates, found those rates to be "unjust and unreasonable" under NGA section 5, established procedures to set just and reasonable gathering rates, and ultimately approved a settlement (to which the Petitioners are parties) establishing reduced gathering rates.[1] On this basis alone, the petitions should be denied.

Moreover, even under Petitioners' hypothetical case where NGA rate regulation over gathering would be relinquished, there still would not be a regulatory gap. Petitioners' contrary claims disregard the fact that Congress enacted the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.*, to guarantee shippers open and nondiscriminatory access to all OCS pipelines, including NGA-exempt gathering lines.

Finally, *ExxonMobil* is consistent with the decisions of this Court and each of the Circuits that have addressed similar issues. In fact, in an earlier phase of *this case*, on the identical facts, the Fifth Circuit vacated and remanded FERC orders that attempted the same result Petitioners seek here, that is, to assert jurisdiction over Sea Robin's entire system. *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997) ("*Sea Robin-I*").[2] Petitioners would jettison the legal basis that has governed more than fifty years of natural gas industry regulation, including the past two decades of industry restructuring that has increased competition and market access through the "unbundling" of natural gas sales, transportation, and gathering services.

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[1] *Sea Robin Pipeline Co.*, 87 FERC ¶ 61,384, at 62,432, ordering para. (C) (1999), *reh'g denied*, 92 FERC ¶ 61,072 (2000), *reh'g denied*, 94 FERC ¶ 61,137, at 61,525 (2001), *on compliance filing*, 95 FERC ¶ 61,329, at 62,172-73, *approving settlement*, 98 FERC ¶ 61,263 (2002).

[2] Dissatisfied with the decision of the Fifth Circuit, Petitioners appealed FERC's remand orders (which divided Sea Robin's system into jurisdictional and nonjurisdictional segments) to the D.C. Circuit, which again rejected Petitioners' position.

STATUTES INVOLVED

In addition to the statutes attached to the petitions, this case involves various provisions of the OCSLA, which are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

The reclassification of portions of Sea Robin's system as exempt "gathering" is an outgrowth of congressional and regulatory enactments that have restructured the natural gas industry. Since the NGA's inception in 1938, section 1(b) has stated that the NGA "shall not apply to . . . the production or gathering of natural gas." 15 U.S.C. § 717(b). Consistent with that statutory restriction, FERC has never regulated gathering performed by "independent" gatherers, *i.e.*, those that do not also provide bundled NGA-jurisdictional services. In contrast, gathering and production activities performed by interstate pipelines have long been FERC-regulated because those activities were "bundled" with the pipelines' NGA-jurisdictional sales and transportation services.[3]

In the 1970s, the structure of the natural gas industry changed dramatically in response to the failure of gas price controls and resulting gas shortages. *See United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1123 (D.C. Cir. 1996). Those circumstances prompted Congress to enact measures to limit regulation and foster competition in the natural gas industry. For example, the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq.*, required the phased deregulation of wellhead prices for certain categories of gas, and later the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60,

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[3] Such authority was recognized by this Court in *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945) (NGA "does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company . . . for the purposes of determining the reasonableness of rates subject to its jurisdiction").

103 Stat. 157 (1989), phased out all remaining wellhead price controls. Following Congress' lead, FERC established a program of open-access and nondiscriminatory transportation, and later mandated the unbundling of gas sales and interstate transportation. *Conoco Inc. v. FERC*, 90 F.3d 536, 539-40 (D.C. Cir. 1996). Congress saw the Commission's implementation of open-access transportation as "essential" to its decision to deregulate wellhead sales. *See United Distribution,* 88 F.3d at 1125.

This restructuring ended the interstate pipelines' decades-old role as merchants of bundled service (*i.e.*, purchasing, gathering, transporting, and reselling natural gas as a single service) and transformed them into open-access transporters, effectively serving as common carriers. *See id.* at 1122-30. Absent their former merchant sales obligations, pipelines no longer needed to own extensive gathering systems to secure gas supplies (*see Conoco,* 90 F.3d at 539-41), and pipelines began "unbundling" their NGA-exempt gathering facilities from their NGA-regulated transportation facilities. To assure implementation of these policies, FERC required pipelines to "separately identify cost components attributable to transportation, storage, and gathering costs."[4] With gathering "unbundled" as a stand-alone service, various interstate pipelines transferred their gathering facilities to non-NGA-regulated companies that could compete on equal footing with non-NGA-regulated independent gatherers, such as a number of the Petitioners (or their affiliates). *See Conoco*, 90 F.3d at 541. Over the past two decades, onshore pipelines

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[4] *Policy Statement Providing Guidance with Respect to the Designing of Rates*, 47 FERC ¶ 61,295, at 62,059 (1989), (quoting regulations now codified at 18 C.F.R. § 284.10(c)(2)). *See also Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates*, 65 FERC ¶ 61,136, at 61,690 (1993) ("The Commission has required gathering rates to be separately stated and unbundled from mainline transportation rates in a number of restructuring cases.").

have largely completed their unbundling of gathering, and offshore pipelines, such as Sea Robin, likewise have requested FERC determinations to identify and unbundle their NGA-exempt gathering facilities.[5]

In tandem with these pro-competitive restructuring initiatives, Congress amended and strengthened the OCSLA to ensure the expeditious and orderly development of OCS resources consistent with certain "competitive principles" to protect OCS shippers. *See* OCSLA Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978). Among other things, the OCSLA requires *all* OCS pipelines to "provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334(f)(1)(A).

REASONS FOR DENYING THE PETITIONS

A. This Case Is Not Appropriate For Review Because The Claimed Harm To Consumers Is Non-Existent.

Petitioners claim that review is necessary to protect the reliance interests of gas producers arising from prior NGA regulation of OCS facilities, and to protect gas consumers from unregulated rates on OCS pipelines. Petitioners' contention has no merit. The harm alleged in their petitions does not exist here because FERC has not relinquished NGA rate jurisdiction over *any* of the facilities at issue.

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[5] Originally, Sea Robin requested a declaratory order that its *entire* pipeline system functions as NGA-exempt gathering. FERC denied that request, ruling that Sea Robin's *entire* system is jurisdictional. *Sea Robin Pipeline Co.*, 71 FERC ¶ 61,351 (1995), *reh'g denied*, 75 FERC ¶ 61,332 (1996). On appeal in *Sea Robin-I*, the Fifth Circuit vacated and remanded FERC's orders. On remand, FERC ruled that the portion of Sea Robin's system upstream of the Vermilion 149 Station is NGA-exempt gathering, while the portion downstream of that point is jurisdictional. Petitioners appealed FERC's remand orders in *ExxonMobil*.

Specifically, notwithstanding FERC's determination that a portion of Sea Robin's OCS facilities constitute exempt "gathering" under NGA section 1(b), FERC ruled that it has full NGA rate authority over Sea Robin's entire offshore system, including its gathering facilities:

> Sea Robin also asserts that the Commission lacks the authority to require Sea Robin to file gathering rates after revoking its NGA Section 7 certificate for the gathering facilities. Sea Robin is incorrect. In *Northern Natural Gas Company, Division of Enron Corp. v. FERC*, 929 F.2d 1261, 1263 (8th Cir. 1991), *cert. denied*, 502 U.S. 856 (1991), the Court ruled that the FERC "may regulate rates charged for transportation on the company's own gathering facilities performed *in connection with* jurisdictional interstate transportation." Here, Sea Robin still owns the subject gathering facilities that are used to bring gas to the jurisdictional portion of its system where the gas continues on its way in interstate commerce. As a result, *Sea Robin's gathering rates are within the Commission's rate jurisdiction under the NGA.*

Sea Robin, 94 FERC at 61,525 (emphasis added) (footnote omitted). Moreover, FERC exercised its NGA authority in ruling that Sea Robin's rates, including its gathering rates, are "unjust and unreasonable" and requiring Sea Robin to file "separately stated, fully allocated, cost-based rates for [its] transportation and gathering services." *Sea Robin*, 95 FERC at 61,172 (footnote omitted). It bears emphasis that the Petitioners participated in Sea Robin's rate proceeding and successfully argued that FERC should require Sea Robin to reduce its rates for gathering and other services.

In short, the lynchpin of Petitioners' claims regarding the necessity for this Court's review, specifically, FERC's

purported relinquishment of NGA rate jurisdiction, is non-existent. For that reason alone, review by this Court cannot be justified.

B. Even Under Petitioners' Hypothetical Of Discontinued FERC Rate Regulation, There Is No "Regulatory Gap" With Respect To OCS Gathering Lines.

Moreover, even assuming the validity of Petitioners' hypothetical, *i.e.*, the absence of NGA regulation over OCS gathering lines, no regulatory gap would result, contrary to Petitioners' claims.[6] That is because the OCSLA protects all shippers on all OCS pipelines, including NGA-exempt gathering lines.

When Congress amended the OCSLA in 1978 (at about the same time that it commenced partial decontrol of wellhead gas prices), it specifically rejected an amendment to extend NGA jurisdiction to all OCS gas pipelines. 124 Cong. Rec. 2092-93 (Feb. 2, 1978). Moreover, Congress recognized that "the Outer Continental Shelf is a vital national resource . . . which should be made available for expeditious and orderly development . . . in a manner which is consistent with the maintenance of *competition* and other national needs." 43 U.S.C. § 1332(3) (emphasis added). *See also* 43 U.S.C. § 1801(7) (finding that the OCS must be managed "to preserve and maintain competition"); 43 U.S.C. § 1802(2)(D) (a purpose of the Act is "to preserve and maintain free enterprise competition");

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[6] Of course, a purported "regulatory gap" cannot support Commission jurisdiction over facilities that otherwise qualify as exempt "gathering." *ExxonMobil*, 297 F.3d at 1088 ("We emphatically agree that 'need for regulation cannot alone create authority to regulate'") (quoting *Sea Robin-I*, 127 F.3d at 371); *Northwest Pipeline Co. v. FERC*, 905 F.2d 1403, 1412 (10th Cir. 1990) ("If, upon proper application of the primary function test, the facilities are indeed exempt from Commission jurisdiction, whatever 'attractive [regulatory] gap' results was clearly created by Congress.").

43 U.S.C. § 1334(a) (requiring consultation with the Attorney General on "matters which may affect competition"); 43 U.S.C. § 1334(f) (mandating "competitive principles" to govern OCS pipeline operations).

Chief among those "competitive principles" was Congress' mandate that all OCS pipelines "must provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334 (f)(1)(A). Other sections of the OCSLA allow FERC in appropriate circumstances to allocate pipeline capacity in "proportionate amounts" (43 U.S.C. § 1334 (e)), order pipeline expansions (43 U.S.C. § 1334 (f)(1)(B)), and condition permits to ensure compliance with the OCSLA's "competitive principles." 43 U.S.C. § 1334 (f)(1). Violators of the OCSLA are subject to injunctions and civil and criminal penalties (43 U.S.C. § 1350), as well as citizens suits. 43 U.S.C. § 1349. To implement these congressional mandates, FERC policy calls for vigorous response to complaints filed pursuant to the OCSLA by shippers on OCS gathering pipelines. *OCS Policy Statement*, 74 FERC ¶ 61,222, at 61,758 (1996).

In short, Congress was well aware that its OCSLA regulatory scheme would leave OCS "gathering" pipelines exempt from NGA rate regulation, but chose instead to regulate OCS pipelines by enhancing "competition" and providing comprehensive mechanisms, described above, to prevent abuse in the marketplace. Thus, Congress avoided the purported "regulatory gap" about which Petitioners complain.

C. *ExxonMobil* Is Consistent With Decisions Of This Court And Other Circuits.

The decision below properly applied *Chevron's* two-step analysis in reviewing FERC's interpretation of the term "gathering" as used in NGA section 1(b). In that regard, no party disputes that, in the NGA, Congress has not "directly

spoken to" the meaning of the term "gathering." *Chevron*, 467 U.S. at 842. Thus, the reviewing court's task is to determine "whether the agency's answer is based on a permissible construction of the statute" (*id.* at 843), and it must accord "deference" and "considerable weight" to the agency's construction of the statute. *Id.* at 844. Ignoring *Chevron*, Petitioners argue that FERC's interpretation of NGA section 1(b) conflicts with *Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84 (1963) and other decisions of this Court and the Circuits. Petitioners' position is seriously flawed.

1. *Northern Natural* is a preemption case that concerned orders of the Kansas State Corporation Commission attempting to regulate the manner in which pipelines purchase gas from production fields for resale in interstate markets. The Corporation Commission's orders required each pipeline to purchase gas "ratably" from all Kansas wells to which a given pipeline was connected. *Id.* at 86. This Court rejected the argument that the NGA's "gathering or production" exemption allowed the state to dictate the manner in which sales are made in interstate markets. *Id.* at 89-93. The Court explained that "'production' and 'gathering' are terms narrowly confined to the *physical* acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Id.* at 90 (emphasis added). Petitioners distort the holding of *Northern Natural*, which recognized the "physical" basis for NGA-exempt gathering, as distinct from "business" activities such as gas sales conducted from the gathering facilities. *See also Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, 681 (1954) ("the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering

of natural gas," but not to "the 'business' of production or gathering, with the sale of the product considered an integral part of such 'business.'").[7]

The jurisdictional determination affirmed below is fully consistent with the "physical" nature of gathering recognized in *Northern Natural* and *Phillips*. Indeed, for over fifty years, the Commission has distinguished non-jurisdictional *gathering* from jurisdictional *transportation* based on various "physical criteria," and since 1983 those criteria have been embodied in the Commission's "primary function" test. *ExxonMobil*, 297 F.3d at 1077. In this case, the Commission considered "13 *physical factors* . . . in concluding that the [Sea Robin] facilities upstream of the Vermilion 149 Station are engaged in non-jurisdictional gathering." *Id.* at 1081 (emphasis added). Moreover, the Sea Robin system "carries a raw stream of unpurified natural gas and liquid hydrocarbons taken directly from the gas wells" (*id.* at 1078), and delivers the raw gas to compressor stations and processing plants near Erath, Louisiana, "where the gas is separated, dehydrated, and processed . . . [in preparation] for delivery to downstream transmission pipelines at five nearby entry points." *Id.* Such physical factors are fully consistent with the Court's recognition in *Northern Natural* that gathering involves "preparing [the gas] for the first stages of distribution."[8] 372 U.S. at 90.

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[7] Additionally, while *Phillips* held that producer sales for resale in interstate commerce are subject to FERC's jurisdiction, *Phillips* left intact FERC's (then the Federal Power Commission) NGA exemption for gas processing plants and the pipelines delivering gas to them. *See Phillips Petroleum Co.*, 10 FPC 246, 277-78 (1951).

[8] The fact that Sea Robin's *entire* system moves raw, unprocessed gas to Erath for processing indicates that Sea Robin's *entire* system may serve an NGA-exempt gathering function, as Sea Robin contended in its original petition to FERC. *See supra* note 5. Indeed, the court below (297 F.3d. at 1084) stated: "Were we the Federal Energy Regulatory Com-

Ignoring the "physical" realities of gathering recognized in *Northern Natural* and *Phillips* (as well as over fifty years of Commission practice), Petitioners argue that "[i]n section 1(b) of the NGA, Congress adopted the 'mechanical' line of this Court's Commerce Clause cases 'as the statutory line dividing federal and state jurisdiction'" (Petition No. 02-1265 at 13) (internal quotes omitted), and that the scope of gathering is limited by a purported "congressional intent to occupy the field of interstate commerce in natural gas." *Id.* at 18. Petitioners' theory is flatly contradicted by this Court's recognition that:

> When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. *It "did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power.* Rather it contemplated the exercise of federal power as specified in the Act."

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 510 (1989) (quoting *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502-03 (1949)) (emphasis added). Recognizing Congress' careful limitation of federal authority under the NGA, in *Northwest Central* the Court explained that section 1(b)'s gathering and production exemption,

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mission, we might draw the [jurisdictional] line at Erath." However, the issue of whether FERC should have found Sea Robin's *entire* system nonjurisdictional was not before the court in *ExxonMobil* because Sea Robin did not appeal FERC's orders on remand in *Sea Robin-I*. Additionally, despite Petitioners' repeated references to "consumer protection" concerns, the *raw, unprocessed* gas moved by Sea Robin is not suitable for sale to consumer markets and indeed no such consumer markets exist on the OCS. Rather, in the restructured natural gas industry, gas prices are set by competitive forces at the market or market "hubs" well downstream of the field, while upstream producers and transporters (including gatherers) allocate their respective shares of the downstream market-set price on a "netback" basis. *See Shell Gas Pipeline Co.*, 78 FERC ¶ 61,192, at 61,828-29 (1997) (Santa, Comm'r dissenting).

"expressly reserv[ed] to the States the power to regulate, among other things 'the production or gathering of natural gas,' that is, 'the physical acts of drawing gas from the earth and preparing it for the first stages of distribution.'" *Id.* (quoting *Northern Natural*, 372 U.S. at 90). Thus, Petitioners' theory that Congress defined the NGA gathering exemption as narrowly as constitutionally permissible is conclusively refuted by *Northwest Central's* recognition that the NGA's gathering exemption is *not* constricted by "federal regulation . . . to the limit of constitutional power." *Id.*

Finally, the erroneous nature of Petitioners' restrictive interpretation of NGA section 1(b) is also demonstrated by the fact that gathering commonly occurs in very large pipeline networks that extend *across state borders* and undeniably operate in interstate commerce. In fact, the gathering systems involved in *Phillips* consisted of "nine such networks of pipelines" of which "five are located entirely in Texas, one in Oklahoma, one in New Mexico, and *two extend in both Texas and Oklahoma.*"[9] *Phillips*, 347 U.S. at 675 (emphasis added).

2. *ExxonMobil* is also consistent with decisions of other Circuits that have addressed the scope of NGA-exempt gathering. While Petitioners strain to portray a conflict

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[9] Likewise, a number of Circuit decisions have recognized that NGA-exempt gathering can occur in large pipeline systems operating in interstate commerce. *See e.g.*, *Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1193 (5th Cir. 1997) (affirming the Commission's relinquishment of NGA jurisdiction over twenty-nine gathering facilities in New Mexico, Colorado, Oklahoma, and Texas); *Northwest Pipeline*, 905 F.2d at 1404 (overturning FERC's assertion of jurisdiction over six gathering facilities in Colorado and Utah); *Conoco*, 90 F.3d at 541-50 (affirming FERC's relinquishment of jurisdiction over gathering facilities located at 105 sites in Arkansas, Louisiana, Oklahoma, and Texas); and *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1195-98 (D.C. Cir. 2000) (affirming FERC's relinquishment of jurisdiction over a gathering system located in New York and Pennsylvania).

among the Circuits, just the opposite is true.[10] The Circuits that have addressed this issue have unanimously endorsed a multi-factor analysis to identify NGA-exempt gathering facilities based on the physical criteria of the Commission's "primary function" test. In fact, in an earlier phase of these proceedings, the Fifth Circuit—just like the D.C. Circuit in *ExxonMobil*—specifically rejected the Petitioners' position on the merits. Thus, in *Sea Robin-I* the Fifth Circuit vacated and remanded the Commission's initial orders attempting to assert jurisdiction over Sea Robin's *entire* pipeline system, *i.e.*, the jurisdictional result advocated by Petitioners. The Fifth Circuit recognized that "Congress drew a distinction based on the *physical* patterns of the industry, gathering versus transporting," and admonished the Commission for placing too much reliance on "*non*-physical" factors. *Sea Robin-I*, 127 F.3d at 371 (emphasis added). The Fifth Circuit held that "[i]f the Commission is to remain tethered to statute, as it must, that [jurisdictional] inquiry must be based primarily on *physical* criteria and the *realities of the field*." *Id.* (emphasis added). The Fifth Circuit even suggested that FERC might (as FERC, in fact, did) adopt the Vermilion Compressor Station as the jurisdictional demarcation point:

> Discomfort in drawing jurisdictional lines at points internal to an overall system may be soothed with the reminder that Congress did not intend to extend FERC's jurisdiction to all natural gas pipelines; indeed it demands the drawing of jurisdictional lines, even when the end of gathering is not easily located (consider, for

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[10] Petitioners cite Circuit cases applying the unsurprising principle that exceptions to a primary grant of authority should be strictly construed (*see* Petition No. 02-1265 at 18), a principle with which *ExxonMobil* and the subject FERC orders are fully consistent, as demonstrated by FERC's very conservative approach to relinquishing jurisdiction in the face of record facts supporting a much broader nonjurisictional finding. *See supra* note 8.

> example, a distinction between the field south of the Vermillion [sic] Compressor Station and the pipelines leading north to Erath, Louisiana).

Id. In sum, *ExxonMobil* is fully consistent with the holding and reasoning of the Fifth Circuit's decision on the identical facts in *Sea Robin-I*. Indeed, the instant Petitions are effectively collateral attacks on *Sea Robin-I*.

Additionally, in *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989), the Fifth Circuit reversed the Commission's attempt to assert jurisdiction over a 51-mile OCS pipeline. The court expressly rejected the theory (espoused by Petitioners in the proceedings below) that exempt "gathering" ends at the upstream floating platforms where gas is produced. *Id.* at 49. The court ruled that the Commission's jurisdictional determination under the "primary function" test must be based on "consideration of all the facts and circumstances . . . rather than application of any overarching bright line standards" (*id.* at 48), and found that the subject 51-mile pipeline functioned as "an integral part of the natural gas gathering system" because it "is simply the most practical way to move the product from the seabed to a point nearer shore where it can be processed and introduced into a pipeline." *Id.* at 49.

Similarly, in *Northwest Pipeline* the Tenth Circuit overturned the Commission's attempt to assert jurisdiction over various gathering facilities owned by an interstate pipeline and rejected the Commission's argument that "ultimately, the facilities are owned by and eventually connected to a company which *has as its primary function* the interstate transportation of gas." 905 F.2d at 1410. The Tenth Circuit emphasized that "[t]he gathering exemption was not meant to attach only to certain owners/operators but to facilities" (*id.* at 1411), and found that the physical factors of the Com-

mission's primary function analysis had been improperly "subsumed" by the non-physical ownership consideration. *Id.* at 1409-11.[11]

D. NGA Section 7(b) Abandonment Requirements Do Not Apply To NGA-Exempt Gathering Facilities.

Nor is there any merit to Petitioners' claim that FERC was required to conduct a public interest "abandonment" analysis under NGA section 7(b) with respect to facilities found to be NGA-exempt gathering. Petition No. 1265 at 22-27. First, as a practical matter, Sea Robin did not "abandon" any services (*i.e.*, service was not terminated to any customers). *See ExxonMobil*, 297 F.3d at 1088. Second, and more fundamentally, in *Panhandle*, 337 U.S. at 509, this Court, relying on the plain words of the statute, held that the abandonment requirements of NGA section 7(b) apply only to "facilities subject to the jurisdiction of the Commission," and not to "gathering" facilities exempt from the NGA under section 1(b). The Court rejected arguments of the Federal Power Commission (now FERC) that otherwise exempt production or gathering facilities would nevertheless be subject to section 7(b):

> The argument here is that since natural gas is the "lifeblood" of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the

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[11] Finally, Petitioners argue that FERC's nonjurisdictional determination for portions of Sea Robin's system must be unreasonable because a jurisdictional pipeline (the Garden Banks pipeline) interconnects with Sea Robin's gathering facilities. However, the *ExxonMobil* court properly disposed of that argument noting that in prior cases presenting such a circumstance, the *jurisdictional upstream* pipeline was ultimately reclassified, which "suggests that it is the Garden Banks pipeline, rather than Sea Robin, that has been erroneously classified." 297 F.3d at 1087.

question. *The section, like those above, covers only "facilities subject to the jurisdiction of the Commission."*

To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act . . . .

Id. at 509 (footnotes omitted) (emphasis added).[12]

CONCLUSION

Wherefore, Respondent Williams Gas Processing-Gulf Coast Company respectfully submits that the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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May 30, 2003

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[12] The abandonment cases cited by Petitioner (Petition No. 02-1265 at 22-25) are off point. In *ExxonMobil*, the subject service was *NGA-exempt* gathering, while the cases cited by Petitioner involved the abandonment of *NGA-jurisdictional* sales or transportation services.

APPENDIX

APPENDIX

Excerpts from Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.*

43 U.S.C. § 1332 (2003)

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act;

(2) this Act shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 8(g) [43 U.S.C. § 1337(g)], will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf[.;]

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

43 U.S.C. § 1334 (2003)

§ 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations.

The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall

prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this Act. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of

gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures

made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before the date of enactment of this subparagraph [enacted Sept. 18, 1978], such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C.§ 7401 *et seq.*), to the extent that activities authorized under this Act significantly affect the air quality of any State.

(b) Compliance with regulations as condition for issuance, continuation, assignment, or other transfer of leases.

The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act.

(c) Cancellation of nonproducing lease.

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this Act, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(d) Cancellation of producing lease.

Whenever the owner of any producting lease fails to comply with any of the provisions of this Act, of the lease, or of the regulations issued under this Act, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this Act.

(e) Pipeline rights of way; forfeiture of grant.

Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 21(b) of this Act [43 U.S.C. § 1347(b)]) assuring maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the

interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this Act.

(f) Competitive principles governing pipeline operation.

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after the date of enactment of this subparagraph [enacted Sept. 18, 1978]. This subparagraph shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the

requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

(g) Rates of production.

(1) The leasee [lessee] shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

(h) Federal action affecting outer Continental Shelf; notification; recommended changes.

The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

(i) Flaring of natural gas.

After the date of enactment of this section [enacted Sept. 18, 1978], no holder of any oil and gas lease issued or maintained pursuant to this Act shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.

(j) Cooperative development of common hydrocarbon-bearing areas.

(1) Findings. [(A)] The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including—

(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;

(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

(2) Prevention of harmful effects. The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.

43 U.S.C. § 1349 (2003)

§ 1349. Citizens suits, jurisdiction and judicial review

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security.

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this Act or any regulation promulgated under this Act, or of the terms of any permit or lease issued by the Secretary under this Act.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this Act, or any regulation promulgated under this Act, or the terms of any permit or lease issued by the Secretary under this Act, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b) Jurisdiction and venue of actions.

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this Act. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c) Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court.

(1) Any action of the Secretary to approve a leasing program pursuant to section 18 [43 U.S.C. § 1344] of this Act shall be subject to judicial review only in the United States Court of Appeal [Appeals] for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this Act shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this Act and any additional information upon which the Secretary based his decision, as required by section 2112 of title 28, United States Code. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment

shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

(d) [Repealed]

43 U.S.C. § 1350 (2003)

§ 1350. Remedies and procedures

(a) Injunctions, restraining orders, etc.

At the request of the Secretary, the Secretary of the Army, or the Secretary of the Department in which the Coast Guard is operating, the Attorney General or a United States attorney shall institute a civil action in the district court of the United States for the district in which the affected operation is located for a temporary restraining order, injunction, or other appropriate remedy to enforce any provision of this Act, any regulation or order issued under this Act, or any term of a lease, license, or permit issued pursuant to this Act.

(b) Civil penalties; hearing.

(1) Except as provided in paragraph (2), if any person fails to comply with any provision of this Act, or any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under this Act, after notice of such failure and expiration of any reasonable period allowed for corrective action, such person shall be liable for a civil penalty of not more than $ 20,000 for each day of the continuance of such failure. The Secretary may assess, collect, and compromise any such penalty. No penalty shall be assessed until the person charged with a violation has been given an opportunity for a hearing. The Secretary shall, by regulation at least every 3 years, adjust the penalty specified in this paragraph to reflect any increases in the Consumer Price Index (all items, United States city average) as prepared by the Department of Labor.

(2) If a failure described in paragraph (1) constitutes or constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment, a civil penalty may be assessed without regard to the requirement of expiration of a period allowed for corrective action.

(c) Criminal penalties.

Any person who knowingly and willfully (1) violates any provision of this Act, any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under the authority of this Act designed to protect health, safety, or the environment or conserve natural resources, (2) makes any false statement, representation, or certification in any application, record, report, or other document filed or required to be maintained under this Act, (3) falsifies, tampers with, or renders inaccurate any monitoring device or method of record required to be maintained under this Act, or (4) reveals any data or information required to be kept confidential by this Act shall, upon conviction, be punished by a fine of not more than $100,000, or by imprisonment for not more than ten years, or both. Each day that a violation under clause (1) of this subsection continues, or each day that any monitoring device or data recorder remains inoperative or inaccurate because of any activity described in clause (3) of this subsection, shall constitute a separate violation.

(d) Liability of corporate officers and agents for violations by corporation.

Whenever a corporation or other entity is subject to prosecution under subsection (c) of this section, any officer or agent of such corporation or entity who knowingly and willfully authorized, ordered, or carried out the proscribed activity shall be subject to the same fines or imprisonment, or both, as provided for under subsection (c) of this section.

(e) Concurrent and cumulative nature of penalties.

The remedies and penalties prescribed in this Act shall be concurrent and cumulative and the exercise of one shall not preclude the exercise of the others. Further, the remedies and penalties prescribed in this Act shall be in addition to any other remedies and penalties afforded by any other law or regulation.

43 U.S.C. § 1801 (2003)

§ 1801. Congressional findings

The Congress finds and declares that—

(1) the demand for energy in the United States is increasing and will continue to increase for the foreseeable future;

(2) domestic production of oil and gas has declined in recent years;

(3) the United States has become increasingly dependent upon imports of oil from foreign nations to meet domestic energy demand;

(4) increasing reliance on imported oil is not inevitable, but is rather subject to significant reduction by increasing the development of domestic sources of energy supply;

(5) consumption of natural gas in the United States has greatly exceeded additions to domestic reserves in recent years;

(6) technology is or can be made available which will allow significantly increased domestic production of oil and gas without undue harm or damage to the environment;

(7) the Outer Continental Shelf contains significant quantities of oil and natural gas and is a vital national resource reserve which must be carefully managed so as to realize fair value, to preserve and maintain competition, and to reflect the public interest;

(8) there presently exists a variety of technological, economic, environmental, administrative, and legal problems which tend to retard the development of the oil and natural gas reserves of the Outer Continental Shelf;

(9) environmental and safety regulations relating to activities on the Outer Continental Shelf should be reviewed in light of current technology and information;

(10) the development, processing, and distribution of the oil and gas resources of the Outer Continental Shelf, and the siting of related energy facilities, may cause adverse impacts on various States and local governments;

(11) policies, plans, and programs developed by States and local governments in response to activities on the Outer Continental Shelf cannot anticipate and ameliorate such adverse impacts unless such States, working in close cooperation with affected local governments, are provided with timely access to information regarding activities on the Outer Continental Shelf and an opportunity to review and comment on decisions relating to such activities;

(12) funds must be made available to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges;

(13) because of the possible conflicts between exploitation of the oil and gas resources in the Outer Continental Shelf and other uses of the marine environment, including fish and shellfish growth and recovery, and recreational activity, the Federal Government must assume responsibility for the minimization or elimination of any conflict associated with such exploitation;

(14) the oil and gas resources of the Outer Continental Shelf are limited, nonrenewable resources which must be

developed in a manner which takes into consideration the Nation's long-range energy needs and also assures adequate protection of the renewable resources of the Outer Continental Shelf which are a continuing and increasingly important source of food and protein to the Nation and the world; and

(15) funds must be made available to pay for damage to commercial fishing vessels and gear resulting from activities involving oil and gas exploration, development, and production on the Outer Continental Shelf.

43 U.S.C. § 1802 (2003)

§ 1802. Congressional declaration of purposes

The purposes of this Act are to—

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oilspill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interest caused by such spills or discharges;

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and

(10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels and gear due to Outer Continental Shelf activities.

Supreme Court, U.S.
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Nos. 02-1215 and 02-1265

In the Supreme Court of the United States

PRODUCER COALITION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

EXXONMOBIL GAS MARKETING COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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331-P

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC) reasonably concluded that a portion of Sea Robin's pipeline system located on the Outer Continental Shelf involves the gathering of natural gas within the meaning of Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b).

2. Whether FERC was required to determine that reclassification of a portion of Sea Robin's system as non-jurisdictional furthered the public interest under Section 7(b) of the NGA, 15 U.S.C. 717f(b).

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a)[1] is reported at 297 F.3d 1071. The orders of the Federal Energy Regulatory Commission are reported at 87 F.E.R.C. ¶ 61,384 (Pet. App. 74a-98a) and 92 F.E.R.C. ¶ 61,072 (Pet. App. 39a-73a).

[1] References to the Pet. App. are to the appendix to the petition for a writ of certiorari in No. 02-1265.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2002. The court of appeals denied rehearing on October 22, 2002. The petition for a writ of certiorari in No. 02-1215 was filed on February 19, 2003. The petition for a writ of certiorari in No. 02-1265 was filed on February 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, confers on the Federal Energy Regulatory Commission (FERC) jurisdiction to regulate certain aspects of the natural gas industry. The provisions of the NGA apply to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to," *inter alia*, "the production or gathering of natural gas." 15 U.S.C. 717(b).

The NGA gives FERC the authority to ensure that rates and charges are "just and reasonable" and to declare as unlawful any "unjust, unreasonable, unduly discriminatory, or preferential" rate or charge for or "in connection with" any "transportation or sale of natural gas" subject to FERC's jurisdiction. 15 U.S.C. 717c(a), 717d(a). The Act also requires that any natural gas company obtain a "[c]ertificate of public convenience and necessity" before constructing or operating new facilities, 15 U.S.C. 717f(c), and further bars any natural gas company from "abandon[ing] all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities," without a finding that the gas is depleted "or that

the present or future public convenience or necessity permit the abandonment," 15 U.S.C. 717f(b).

2. This case involves FERC's reclassification of a portion of a pipeline system as "gathering" facilities for natural gas within the meaning of 15 U.S.C. 717(b). Although the NGA does not define the term "gathering," this Court has stated that the terms "production and gathering" under the NGA are "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 90 (1963). Consistent with that principle, FERC has long defined the term gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line." *Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957).

To differentiate jurisdictional transportation and non-jurisdictional gathering for pipelines, FERC for many years has employed two principal tests. Under the "behind-the-plant" test, facilities upstream of compressors and processing plants (*i.e.* toward the wellhead where the gas comes out of the ground) were presumptively gathering facilities, while facilities downstream of the plants (*i.e.* toward the consumer) were presumptively transportation facilities. For gas that requires no processing, FERC has also employed a "central-point-in-the–field" test under which lateral lines collecting and transporting gas from separate wells that then converge into a single large line were classified as gathering facilities, while facilities downstream of the collection point in a field were classified as transportation. Since 1983, FERC has subsumed those two tests into a "primary function" test that focuses on a number of physical factors (*e.g.*, length, diameter, and configura-

tion of a pipeline) and certain other criteria, to determine whether facilities are primarily devoted to gathering or transportation. Under that test, no one factor is determinative, nor do all factors apply in every situation. Pet. App. 3a-4a; *Sea Robin Pipeline Co.* v. *FERC*, 127 F.3d 365, 368-369 (5th Cir. 1997).

FERC developed its primary function test in the context of onshore gathering patterns. For natural gas produced on the Outer Continental Shelf (OCS), pipelines generally are configured differently. "[P]ipelines on the OCS typically do not gather gas at a local, centralized point within a field as they would onshore, to prepare it for traditional transportation." Pet. App. 5a. "Rather, on the OCS, relatively long lines are constructed to carry the raw gas from offshore platforms, where '[o]nly the most rudimentary separation and dehydration operations' are conducted to the shore or a point closer to the shore, where it can be processed into 'pipeline quality' gas." *Ibid.* (quoting *EP Operating Co.* v. *FERC*, 876 F.2d 46, 47-48 (5th Cir. 1989) (citation omitted)); accord *Sea Robin*, 127 F.3d at 369-370 (noting that pipelines on the OCS "must construct large pipes to carry (often over a hundred miles away) the raw gas from offshore rigs to the shore for processing"). In response to the practical and physical differences between onshore and offshore pipeline configurations, FERC modified its primary function test for the OCS to allow for the increasing length and diameter of OCS gathering lines, *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,988 (1990), and later announced that it would "presume facilities located in deep water [over 200 feet] are primarily engaged in gathering or production." *Gas Pipeline Facilities & Servs. on the Outer Cont'l Shelf*, 74 F.E.R.C. ¶ 61,222, at 61,759 (1996).

3. Sea Robin Pipeline Company (Sea Robin) is one of numerous competing pipeline systems located on the OCS. Its system is configured roughly in the form of an inverted "Y" with the two arms reaching out into the OCS from a central point about 50 miles south of the Louisiana coast. Pet. App. 6a, 109a (map). The entire system consists of 438 miles of dual-phase pipelines, meaning that it carries a raw stream of unpurified natural gas and liquid hydrocarbons taken directly from the gas wells. *Id.* at 7a, 84a. Sea Robin's two major arms collect raw gas from 67 production platforms, or subsea taps, where Sea Robin's facilities connect to producer or other pipeline laterals, and bring it to the Vermilion 149 Station, located at the fork of the "Y". *Id.* at 85a-86a. There, the gas is compressed and sent north along a single 66-mile, 36-inch pipeline to plants near Erath, Louisiana, where it is processed into pipeline quality gas, and then sent for delivery to interstate pipelines. *Id.* at 86a-87a.

FERC's predecessor (the Federal Power Commission or FPC) originally certificated the Sea Robin system in 1969, authorizing a combined, or "bundled," sales and transportation service that included gathering services. *Sea Robin Pipeline Co.*, 41 F.P.C. 257 (1969). FERC later certificated extensions of the system farther out on the OCS. Pet. App. 84a-85a & n.26. In 1990, Sea Robin ceased its sales service, and thereafter used its OCS pipeline facilities solely to ship gas for producers and marketers for delivery to connecting interstate pipelines. *Id.* at 84a n.25.

In 1995, Sea Robin petitioned FERC to declare that its entire pipeline system serves a non-jurisdictional gathering function. FERC denied the petition and found that Sea Robin's entire system was engaged in jurisdictional transportation services. *Sea Robin Pipe-*

line Co., 71 F.E.R.C. ¶ 61,351 (1995), reh'g denied, 75 F.E.R.C. ¶ 61,332 (1999); Pet. App. 8a. The Fifth Circuit vacated FERC's order and remanded for further proceedings, holding that FERC "gave inadequate attention to the physical and operational facilities of Sea Robin in applying its primary function test." *Sea Robin*, 127 F.3d at 367. The Fifth Circuit concluded its decision by suggesting that FERC consider whether the Vermilion 149 compressor station, where Sea Robin's two major arms converge, represents the dividing line between Sea Robin's gathering and transportation functions. *Id.* at 371.

On remand from the Fifth Circuit, FERC concluded that Sea Robin's system was comprised of two distinct components: a jurisdictional transportation system from the Vermilion 149 Station to Erath, the onshore processing facility, and a non-jurisdictional gathering system upstream of the Vermilion 149 Station. Pet. App. 74a-95a. FERC reasoned that "'the totality of the circumstances' demonstrates that the primary function of the Vermilion-Erath Line is to transport to shore natural gas that has been delivered from many areas through a network-like configuration of relatively smaller diameter lines to a centralized point[, the Vermilion 149 Station,] where the gas is aggregated and compressed." *Id.* at 93a.

Commissioners Bailey and Hebert dissented, concluding that FERC should have reclassified Sea Robin's entire system as involved in non-jurisdictional gathering activity. Pet. App. 94a-98a. Commissioner Bailey expressed the view that "as a practical matter, * * * the movement of most gas across the OCS is primarily a gathering function." *Id.* at 95a. Commissioner Hebert observed that "due to the very nature of gas production on the OCS," one of the elements in the traditional

jurisdictional test—the length of the line—"'is no more than the distance between the point of production and the nearest appropriate connection with an interstate pipeline.'" *Id.* at 98a (quoting *EP Operating*, 876 F.2d at 49).

FERC affirmed its findings on rehearing. Pet. App. 39a-73a. FERC also identified 13 physical factors it considered in determining that the facilities upstream of the Vermilion Station are engaged in gathering activities. *Id.* at 58a-59a. Commissioner Hebert dissented for the reasons stated in his prior dissent. *Id.* at 73a.

Petitioners sought review of FERC's orders in the D.C. Circuit.

4. A divided panel of the D.C. Circuit denied the petitions and held that FERC acted reasonably in considering the relevant physical factors following the Fifth Circuit's remand in *Sea Robin* and by reclassifying a portion of the Sea Robin system as engaged in non-jurisdictional gathering based on those physical factors. Pet. App. 1a-27a. The court of appeals observed that "[r]easonable people may disagree as to where gathering ends and transportation begins [on Sea Robin's system]. Were we the [FERC], we might draw the line at Erath [*i.e.*, the onshore processing plant]. Others might draw it at the production platforms themselves." *Id.* at 18a. The court concluded, however, that "after considering the inherent ambiguity in the statute and the fact that '[t]he line between jurisdictional transportation and non-jurisdictional gathering is not always clear,' (as it is not clear here), [it] simply [could not] conclude that the Commission's choice of the Vermilion 149 Station as the dividing line was unreasonable, especially in light of the Fifth Cir-

cuit's decision on remand." *Ibid.* (quoting *Conoco Inc.* v. *FERC*, 90 F.3d 536, 542 (D.C. Cir. 1996)).

The court of appeals also rejected petitioners' contention that the reclassification of a portion of Sea Robin's system was subject to abandonment proceedings under Section 7(b) of the NGA, 15 U.S.C. 717f(b). The court reasoned that "Sea Robin does not seek to abandon any facilities or services. Rather, it merely seeks to be able to continue operating previously certificated facilities as gathering facilities, exempt from FERC's jurisdiction under the Natural Gas Act." Pet. App. 25a.

Judge Edwards dissented on the ground that FERC had not engaged in reasoned decision-making in reclassifying a portion of Sea Robin's system. Pet. App. 28a-38a.

5. Following FERC's order that Sea Robin file tariff sheets that separately stated its gathering rates, Pet. App. 93a, Sea Robin challenged FERC's authority to require it to file gathering rates. In response, FERC issued an order concluding that it had jurisdiction over Sea Robin's gathering rates under FERC's authority under Sections 4(a) and 5(a) of the NGA, 15 U.S.C. 717c(a), 717d(a), over charges and rates for or "*in connection with*" any regulated pipeline's transportation activities. *Sea Robin Pipeline Co.*, 94 F.E.R.C. ¶ 61,137, at 61,525 (2001). Sea Robin did not challenge that ruling, but rather, in response to petitioners' protests to Sea Robin's proposed rates, filed separate gathering rates that were the subject of an uncontested settlement agreement that included petitioners as parties. *Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 63,023, at 65,092 n.2 (2002). FERC approved that settlement on March 13, 2002, *Sea Robin Pipeline Co.*, 98 F.E.R.C. ¶ 61,263, and those rates currently govern Sea Robin's gathering service on the OCS.

ARGUMENT

Following the Fifth Circuit's decision in *Sea Robin*, FERC determined that the portion of Sea Robin's system upstream of the Vermilion 149 Station is engaged in gathering of natural gas while the remaining system is engaged in transportation. FERC's conclusion rejected both petitioners' view that Sea Robin's entire system is engaged in transportation, as well Sea Robin's view before the Commission that its entire system is engaged in gathering. The court of appeals correctly held, under *Chevron U.S.A., Inc.* v. *Natural Res. Defense Council*, 467 U.S. 837 (1984), that FERC reasonably reclassified a portion of Sea Robin's system based on its consideration of the particular physical factors present in this case. That factbound decision does not conflict with any other court of appeals decision or any decision of this Court.

Nor does this case otherwise present any issue of pressing importance regarding FERC's authority to regulate rates for offshore services on the OCS. Sea Robin's newly reclassified "gathering" service is being provided "in connection with" its transportation service under 15 U.S.C. 717c(a), 717d(a), and FERC therefore continues to regulate, under the NGA, Sea Robin's rates for its gathering services. Indeed, petitioners are parties to a settlement with Sea Robin that sets forth the governing rates and terms of service for gathering service set forth in Sea Robin's currently effective tariff. See p. 8, *supra*.

1. a. Petitioners argue (02-1265 Pet. 8-19; 02-1215 Pet. 11-14) that FERC's Orders in this case conflict with this Court's precedents that recognize that "production and gathering" under the NGA are to be narrowly construed. In petitioner ExxonMobil's apparent

view, that principle imposes a "brightline" test (02-1265 Pet. 8, 18-19) in which any movement of gas by a pipeline involves transportation because no such movement involves any "distinct local activity." Pet. 14 (quoting *Michigan-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 167 (1954)). Petitioner ExxonMobil accordingly believes (Pet. 18 & 25) that Sea Robin's system in its entirety is engaged in transportation because it is akin to a carrier that transports gas "across state lines."

Those contentions ignore the physical reality that Sea Robin's system is *offshore*, where pipelines typically carry raw natural gas over their systems for the purpose of *gathering* the gas so that it may be processed for distribution. Petitioners cite to no decision of any court accepting their view that the function of gathering ceases at the wellhead or production platform operating offshore, and we are aware of none. Indeed, the only courts of appeals to address the contention that all pipeline activity offshore is transportation have rejected it. Thus, the Fifth Circuit in *EP Operating*, 876 F.2d at 48-49, reversed a determination by FERC that gathering was complete at the offshore platform and concluded that an entire 51-mile, 16-inch dual-phase pipeline that connected a floating rig to a fixed platform was engaged in gathering activity. The Fifth Circuit in *Sea Robin*, *supra*, similarly rejected FERC's determination that Sea Robin's system was entirely engaged in transportation.

The decision in *Sea Robin*, 127 F.3d at 370, concluded that "Sea Robin's system resists easy categorization because the logistics of offshore pipelines obscure differences between gathering gas from Gulf platforms and transporting it to the mainland." Because natural gas cannot be processed on open water, pipelines on the OCS carry ("often over a hundred miles") raw gas from

the wellhead to further facilities for processing. *Ibid.* The decision of the D.C. Circuit in this case concurred in that view, and explained that "on the OCS, relatively long lines are constructed to carry the raw gas from offshore platforms, where '[o]nly the most rudimentary separation and dehydration operations' are conducted, to the shore or a point closer to shore, where it can be processed into 'pipeline quality' gas." Pet. App. 5a (quoting *EP Operating*, 876 F.2d at 47, 48). In short, although the terms "production" and "gathering" are "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution," *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 90 (1963), FERC in every case must determine whether the movement of gas through pipelines operating offshore is involved in either gathering or transportation activity.

In this case, FERC applied its settled standards to Sea Robin's particular offshore facilities. As the court of appeals observed:

> It has long been the Commission's view * * * that when gas from separate wells is collected by several lines which converge at a single location in the producing field for delivery into a single line for transportation, the separate lateral lines behind the central point are classified as non-jurisdictional gathering facilities.

Pet. App. 19a. The court found that standard "aptly describes the Sea Robin system." *Ibid.* As the court explained:

> FERC relied on the smaller dimensions of the upstream lines in contrast to the 36-inch Vermilion-Erath line; the 45 laterals feeding into the two upstream arms; the 67 production platforms con-

> nected to the upstream facilities compared with only four downstream; the network configuration of the upstream facilities, and the need for added compression at the Vermilion 149 Station to move gas to shore. All of these physical factors show a meaningful distinction between the facilities upstream and downstream of Vermilion 149 and make it reasonable to define it as the central aggregation point.

Id. at 18a.

Petitioners therefore improperly rely (02-1265 Pet. 15; 02-1215 Pet. 11) on the observation in the dissenting opinion below (see Pet. App. 32a) that at the Vermilion Station, where the upstream arms of the "Y" converge, there is "nothing of any consequence" or "no preparing the gas for the first stages of distribution." FERC's point is that, based on 13 physical factors, the Vermilion Station divides Sea Robin's non-jurisdictional gathering functions from its jurisdictional transportation functions. Thus, FERC permissibly reasoned that "the forks of the 'Y' gathered gas from production platforms at 67 receipt points." *Id.* at 19a.

Petitioner ExxonMobil also errs in arguing (02-1265 Pet. 20-21) that the "crowning flaw" in FERC's orders is that gas from an upstream jurisdictional pipeline, Garden Banks (Pet. App. 109a, SW corner), flows into Sea Robin's reclassified non-jurisdictional gathering lines. As the court of appeals explained, "this suggests that it is the Garden Banks pipeline, rather than Sea Robin, that has been erroneously classified." Pet. App. 23a. Indeed, to hold that FERC was required to classify Sea Robin's entire system as jurisdictional "would create a classic example of circular reasoning," especially given that Garden Banks was originally classified as jurisdictional due to its proximity to the then juris-

dictionally classified Sea Robin system. *Ibid.* Finally, the court of appeals properly concluded that FERC could appropriately "proceed on a case-by-case basis" in determining "how FERC might apply its reformulated primary function test to Garden Banks," as well to other pipelines. *Id.* at 24a.

b. Nothing in the court of appeals' decision conflicts with *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682 (1947), or *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), as suggested by petitioner ExxonMobil (02-1265 Pet. 15-16). Neither of those decisions defined what activity constitutes the "gathering" of natural gas, much less suggested how that inquiry should be conducted for facilities and pipelines operating offshore. Rather, the Court in *Interstate Natural Gas* held that *sales of gas for resale* were not exempt from federal regulation as part of "production and gathering," but rather fell within the NGA's grant of jurisdiction over interstate sales for resale. 331 U.S. at 692, 693. *Phillips* likewise did not involve what pipeline activity constitutes gathering, but rather whether the FPC had jurisdiction "over the rate charged by a natural-gas producer and gatherer in the sale in interstate commerce of such gas for resale." 347 U.S. at 674.[2]

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[2] Contrary to petitioner ExxonMobil's suggestion (02-1265 Pet. 9, 17), the court of appeals' decision also does not conflict with *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), which held that federal regulations governing curtailment of natural gas, which would affect state-regulated direct sales, nevertheless fell within the Commission's transportation jurisdiction. *Id.* at 640-642. Nothing in that decision purports to speak to what pipeline activity constitutes "gathering" under the NGA. Moreover, the concern in *Louisiana* was that individual state curtailment programs would inevitably conflict with the federal and other state

c. Petitioner ExxonMobil argues (02-1265 Pet. 16-18) that the court of appeals' decision erroneously held that a rule of strict construction of gathering activities does not apply when services are separately priced, or "unbundled," and accordingly that the decision below conflicts with the decisions of other courts of appeals. That is not correct, and reflects a misunderstanding of the court of appeals' decision. The court of appeals did not hold that unbundled services are not subject to a rule of strict construction. Rather, the court of appeals made the unremarkable statement that "we now live in an unbundled world" in which pipelines like Sea Robin no longer sell gas, but rather provide unbundled services. Pet. App. 21a. As the court noted, unbundling the pipelines' sales service has afforded pipeline customers access to a competitive wellhead market, *ibid.*, as well as to alternative gathering and transportation providers, and will lessen the danger of passing through to consumers an inflated gathering cost as part of a bundled price. The court of appeals therefore properly stated that "the Supreme Court's restrictive definition of 'gathering,' *while clearly relevant*, must be considered in context." *Ibid.* (emphasis added).

Moreover, the court of appeals explained that in the context of "unbundled, *off-shore* pipeline systems, 'the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution,' cannot be as narrowly construed as *on-shore*." Pet. App. 21a-22a (emphasis added) (quoting *Northern Natural Gas*, 372 U.S. at 90). None of the lower court decisions cited by ExxonMobil (Pet. 18) involved the meaning of the term "gathering" in the context of offshore activities.

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programs (*id.* at 632-633)—a concern that does not apply on the OCS.

2. Petitioner ExxonMobil argues (02-1265 Pet. 22-27) that the court of appeals' determination that FERC need not hold abandonment hearings upon reclassification of Sea Robin's system conflicts with Section 7(b) of the NGA, 15 U.S.C. 717f(b), as well as the Tenth Circuit's decision in *Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466 (1977). That is not correct. In *Phillips*, *id.* at 467-469, the Tenth Circuit upheld an abandonment requirement where a different company undertook the wholesale service of gas that was previously performed by another company that had obtained a certificate to provide that service under a contract at a lower price.[3]

By contrast, Sea Robin continues to provide not only the same gathering services but also continues to provide those services under FERC's jurisdiction over its rates. As explained above (see p. 8, *supra*), FERC exercises "in connection with" jurisdiction over Sea Robin's gathering rates, and petitioners are parties to a settlement that sets forth the governing rates. Similarly, because Sea Robin has not ceased performing any services subject to FERC's rate regulation, this case is not an appropriate vehicle to determine whether Section 7(b) is triggered when a pipeline ceases performing services that FERC has reclassified.

Petitioner ExxonMobil suggests (Pet. 27 n.7) that Sea Robin may someday discontinue its service "when its transportation contracts expire." Petitioner, however, points to no evidence that Sea Robin is poised to cease service, and there is accordingly no need for the

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[3] Petitioner ExxonMobil's reliance (Pet. 26-27) on FERC's decisions in *Trunkline Gas Co.*, 67 F.E.R.C. ¶ 61,256 (1994), and *Freeport-McMoRan, Inc.* v. *KN Energy, Inc.*, 64 F.E.R.C. ¶ 61,189 (1993), is similarly misplaced. Those decisions addressed the need for abandonment proceedings upon transfer of gathering facilities to another company. 67 F.E.R.C. at 61,859; 64 F.E.R.C. at 62,567.

Court to decide an issue at this highly premature juncture.

3. Petitioners finally argue (02-1215 Pet. 9, 15; 02-1265 Pet. 27-30) that this Court's review is necessary to protect investment in natural gas development and to prevent price gouging of producers by NGA-exempt gatherers. That contention is without merit. FERC's orders in this case have no effect on FERC's jurisdiction to regulate pricing for services provided by Sea Robin's system, and petitioners have entered into a settlement agreement that approves the current gathering rates of Sea Robin that remain within FERC's jurisdiction. Moreover, other than the pipeline system at issue in this case and the one in the Fifth Circuit's *EP Operating* decision in 1996, no other court of appeals has passed upon FERC's reclassification of an offshore pipeline as involved in gathering activities.[4]

Nor is petitioner ExxonMobil correct in characterizing (02-1265 Pet. 29) "[t]he situation [as] particularly grave" because state "regulators have no authority on the OCS" to regulate offshore pipeline activity. Under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, *FERC* has jurisdiction over oil and natural gas pipelines that operate offshore. Under OCSLA, "every permit, license, easement, right-of-way, or other grant of authority for transportation by

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[4] Petitioner ExxonMobil (02-1265 Pet. 30) surmises that litigants will "shop among courts of appeals" in seeking review of any FERC reclassification cases on the OCS. No other court of appeals, however, has accepted petitioners' theory that the activity of gathering offshore ceases at the wellhead or production platform. Indeed, both the D.C. Circuit and the Fifth Circuit (in which Exxon Corporation appeared as an intervener) rejected the assertion that Sea Robin's system in its entirety is devoted to transportation services.

pipeline on or across the [OCS] of oil or gas shall require that the pipeline be operated in accordance with [certain] competitive principles," including that "[t]he pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. 1334(f).[5] FERC has exercised its authority under that Act in order to protect the interests of shippers. *Shell Oil Co.* v. *FERC*, 47 F.3d 1186 (D.C. Cir. 1995); see also *Shell Offshore Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 100 F.E.R.C. ¶ 61,254, at 61,914-61,915 (2002) (asserting jurisdiction over sham gathering affiliate of pipeline), reh'g denied, 103 F.E.R.C. 61,177 (2003). Thus, as FERC has explained, any concerns about a "regulatory gap on the OCS * * * are being addressed by the Commission's exercising its authority under the OCSLA, which gives the Commission sufficient authority over non-NGA jurisdictional pipelines to assure that regulatory goals are achieved." Pet. App. 63a.[6]

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[5] The term "transportation" under the OCSLA is broader than the use of that term under the NGA because OCSLA has no exemption for production and gathering activity. Commission Order 639-A, at 31,689 ("transportation" under the OCSLA "covers everything between a wellhead and shore").

[6] In 2000, FERC adopted regulations under the OCSLA to impose reporting requirements on companies that provide natural gas service on the OCS beyond FERC's jurisdiction under the NGA. 65 Fed. Reg. 20,354 (2000). FERC has appealed a district court order enjoining enforcement of those regulations, *Chevron U.S.A., Inc.*, v. *FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), appeal pending *sub nom. Williams Cos.* v. *FERC*, No. 02-5056 (D.C. Cir). That litigation, however, does not challenge FERC's ability under the OCSLA to adjudicate disputes over discriminatory service on the OCS. *Shell Oil Co.* v. *FERC*, 47 F.3d at 1196-1200.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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MAY 2003

Supreme Court, U.S.
FILED
JUN 9 . 2003
OFFICE OF THE CLERK

No. 02-1265

IN THE
Supreme Court of the United States

EXXONMOBIL GAS MARKETING COMPANY, A DIVISION OF EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF

In this case, a divided court of appeals interpreted the Natural Gas Act (NGA) in contravention of its plain language and multiple precedents of this Court, and acquiesced in a surrender of jurisdiction by the Federal Energy Regulatory Commission (FERC) that "is unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.* [v. *State Corp. Commission*, 372 U.S. 84 (1963)]." Pet. App. 35a (Edwards, J., dissenting). The court compounded its error by eviscerating the abandonment provision of section 7(b) of the NGA as applied to jurisdictional transportation service, which frees offshore pipelines like Sea Robin to restructure their operations without any public-interest review by FERC in order to gain unregulated monopoly power over shippers. Respondents protest that the decision below has no effect given the FERC's current exercise of ancillary NGA jurisdiction over Sea Robin's gathering rates, but that is no answer. That rate jurisdiction lasts only as long as Sea Robin abides it. If Sea Robin spins down its freshly christened "gathering" facilities to an affiliate, or spins them off to an unaffiliated company, FERC has stated that it is powerless to stop the transaction or to regulate the rates charged to shippers, unless the transaction is a sham. Accordingly, the issues of NGA jurisdiction presented here will never be reviewed by any court (including this Court). That is why the shipper community is up in arms, and why the pipelines so vigorously defend the decision below despite their disingenuous claims of its irrelevance. The future of NGA regulation on the Outer Continental Shelf (OCS), and the billions of dollars invested in reliance on that regulation, are at stake in this decision. This Court's review is imperative.

1. FERC has NGA jurisdiction if Sea Robin engages in "the transportation of natural gas in interstate commerce" rather than exempt "gathering." 15 U.S.C. § 717(b). It is astonishing that respondents (like the court below) insist that

the basic jurisdictional terms of the NGA are ones of "inherent ambiguity," Pet. App. 18a, and that federal jurisdiction is determined by any line drawn by FERC under an indeterminate multifactor balancing test, if it is not "patently unreasonable." *Id.* at 19a-20a; FERC Opp. 11-12. Nothing could be further from the scheme of the NGA.

The term "transportation of natural gas in interstate commerce" had a plain legal meaning at the time of the NGA's enactment. Natural gas commenced interstate transportation when "the gas *enters the pipeline carrier* and moves on continuously to its outside market" with "'no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line.'" *Michigan-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 167 (1954) (emphasis added) (quoting *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277, 281 (1921)). Indeed, "transportation in interstate commerce," which was immune from direct state regulation under the Commerce Clause, had the same meaning across all commodities: goods were transported in interstate commerce when they "'"actually started in the course of transportation to another State, or were delivered to a carrier for transportation."'" *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 107 (1929). Far from being a concept of "inherent ambiguity," Pet. App. 18a, it was "'clearly defined so as to avoid all ambiguity or question.'" *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62, 71 (1974) (quoting *Coe* v. *Errol*, 116 U.S. 517, 526 (1886)).

There can be no debate (because this Court has held) that the NGA incorporates this "clearly defined" meaning of transportation in interstate commerce, for it adopted the mechanical tests of contemporaneous Commerce Clause jurisprudence in defining federal jurisdiction under the NGA. Pet. 11-13.[1] Because "transportation of natural gas in

[1] Williams challenges this analysis, invoking the declaration in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), that the NGA does not regulate "the entire natural-gas field to the limit of constitutional

interstate commerce" has the plain meaning given by this Court's cases, the statutory term "gathering" likewise has a plain meaning, as this Court ruled in *Northern Natural*: it is "narrowly confined to the physical act[] of ... preparing [gas] for the first stages of distribution." 372 U.S. 84, 90 (1963). Gathering was within state power because it occurred *prior to* interstate transportation: it was a "distinct local activity" that was not part of "a separate movement in commerce." *Michigan-Wis. Pipe Line*, 347 U.S. at 167. Because transportation in interstate commerce has always been broadly construed to ensure effective federal power, Pet. 18-19, this Court has held that the "gathering" and other exceptions to FERC jurisdiction "are to be strictly construed." *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690-91 (1947).

The ruling below that "transportation" is determined by any reasonable *ad hoc* FERC assessment of a pipeline's physical characteristics, without any presumption in favor of jurisdiction, flies in the face of a half-century of precedent. Pet. 14-16. FERC cannot distinguish this Court's precedents applying the strict construction rule on the ground that they involved its sales jurisdiction (FERC Opp. 13); the gathering exemption does not "mean one thing for 'transportation' and another where 'sale for resale' is involved." *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 473 (1950). The FERC also misrepresents petitioners' position. We propose no "'bright-

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power," *id.* at 502. Williams Opp. 12. Williams misunderstands both *Panhandle* and Commerce Clause jurisprudence. Under that jurisprudence, states were allowed concurrent regulation of some aspects of interstate commerce "in the absence of congressional prohibition," 337 U.S. at 510 n.15, but were wholly excluded from others. In the NGA, Congress declined to regulate all interstate commerce in natural gas (such as direct interstate sales to consumers). *Panhandle E. Pipe Line Co.* v. *Public Serv. Comm'n*, 332 U.S. 507, 516-17 (1947). Instead, it limited NGA jurisdiction to "that interstate segment which the states were powerless to regulate because of the Commerce Clause" – namely, interstate sales for resale and interstate transportation – and there its purpose was to "occupy this field." *Panhandle*, 337 U.S. at 503, 510 n.15. Thus, the Commerce Clause definition of interstate transportation is the NGA definition.

line test'" that "any movement of gas by a pipeline involves transportation." FERC Opp. 10. For example, the movement of gas prior to delivery to an interstate carrier, or prior to the point where intrastate rather than interstate transportation may occur, may be exempt gathering, depending on application of FERC's primary function test. Nor do we contend that offshore gathering inexorably "ceases at the wellhead or production platform operating offshore," *id*; rather, because the entirety of the Sea Robin system is engaged in transportation, that is the logical dividing line in this case. Pet. App. 36a (Edwards, J., dissenting).

Petitioners instead contend that "transportation in interstate commerce" has its plain meaning, and that in applying the primary function test the gathering exemption must be "narrowly confined to the physical act[] of ... preparing [gas] for the first stages of distribution." *Northern Natural*, 372 U.S. at 90.[2] Here, there can be no question that Sea Robin engages in interstate transportation from the point that it receives gas that it will carry without interruption across the Louisiana state line. *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U.S. 469, 475 (1926) ("Solution is easy when the shipment has been delivered to the carrier for a destination in another State."). Moreover, as Judge Edwards observed, there is no distinct physical act of preparing gas that occurs at the Vermilion fork, and FERC's designation of that point as gathering "is perplexing on its own terms, and it is unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.*" Pet. App. 35a.[3]

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[2] There is no question of *Chevron* deference (Williams Opp. 10); the agency is entitled to no deference after this Court has interpreted the statute. *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536-37 (1992).

[3] FERC's position is rife with contradiction. It refuses to acknowledge its rule that a transportation pipeline cannot feed into a gathering pipeline, Pet. 20, contending that it will instead apply its 13-factor test (which does not account for adjoining pipelines) to Garden Banks. FERC Opp. 12-13. That shows the arbitrariness of FERC's approach. There is no question that Garden Banks – a single-trunk, 50-mile long "large diameter, high

FERC makes no pretense of complying with *Northern Natural*; it baldly declares that it need not identify any physical act of preparing gas for distribution so long as it applies its 13 factors. FERC Opp. 12. FERC deems it enough that the D.C. Circuit found *Northern Natural* "'clearly relevant.'" *Id.* at 14 (emphasis omitted) (quoting Pet. App. 21a). But *Northern Natural* is controlling, not just relevant, and the court below deviated from *Northern Natural* by refusing to apply a rule of strict construction (even though Sea Robin's physical characteristics "are entirely compatible with a transportation function," Pet. App. 33a (Edwards, J., dissenting)). Instead, the court declared a contrary presumption in favor of whatever line FERC draws. *Id.* at 19a-20a.

Similarly unavailing is FERC's defense of the D.C. Circuit's holding that it would not apply this Court's "restrictive definition of 'gathering'" with the same stringency to offshore pipelines providing unbundled transportation service, Pet. App. 21a-22a. Many errors pervade the lower court's analysis on this point, Pet. 14-18, but its principal error is failing to recognize that the statutory terms "transportation" and "gathering," and the rule of strict construction of exemptions from NGA jurisdiction, derive from the Commerce Clause distinctions incorporated into the NGA.

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pressure facility that does not collect gas from any wells downstream of the Enchilada Platform" – is a transportation facility, as FERC has ruled, *Shell Gas Pipeline Co.*, 74 FERC ¶ 61,277, 61,897 (1996). Jurisdiction should not be on-and-off without change in the underlying statute. Regardless, in reconsidering the jurisdictional status of Garden Banks, FERC may either massage the test to find gathering, or reaffirm its prior ruling with the absurd result that gas will be gathered after being transported; either would be arbitrary. Similarly, FERC emphasizes the importance of whether the pipe is upstream of the processing plant, stating that offshore pipelines "*gather*[] the gas so that it may be processed for distribution." FERC Opp. 10. This contradicts both its order below that the behind-the-plant test has limited importance for offshore pipelines, Pet. App. 82a-83a, and its designation of the Vermilion fork (where no processing occurs) as the dividing line on Sea Robin's system between gathering and transportation.

Strict construction is a legal rule that applies to all pipelines, regardless of their location. Moreover, FERC fails to explain how the new "'context'" of deregulated wellhead sales and unbundled pipeline services, FERC Opp. 14, can affect the FERC's transportation jurisdiction. The statutory grants of sales and transportation jurisdiction are independent, and sales deregulation cannot constrict the scope of the FERC's transportation jurisdiction. Pet. 17 (citing cases).[4] The ruling below on the critical question of NGA jurisdiction irreconcilably conflicts with *Northern Natural* and other precedent.

2. After the FERC's order below, Sea Robin discontinued its receipt-to-delivery jurisdictional transportation service, and replaced it with separately tariffed gathering and transportation services over the different segments of its system. Despite this cessation of jurisdictional service, the D.C. Circuit held that there was no "abandonment" subject to section 7(b) of the NGA because Sea Robin continued to provide the same *physical* service over those facilities, and in any event section 7(b) does not apply to nonjurisdictional facilities. Pet. 25a. The petition demonstrates that the ruling below conflicts: (1) with the plain language of section 7(b), which requires public-interest review of abandonment of both jurisdictional service and jurisdictional facilities, 15 U.S.C. § 717f(b); (2) with *California* v. *Southland Royalty Co.*, 436 U.S. 519, 525-31 (1978), which holds that changing a certificated jurisdictional service into a nonjurisdictional service constitutes an abandonment requiring FERC authori-

[4] Deregulation explains only why interstate pipelines, no longer engaging in jurisdictional sales, now seek reclassification: *i.e.*, to escape rate regulation and use market power to charge high rates. The claim that pipelines need to compete with independent gatherers, Williams Opp. 5, is highly disingenuous; there is virtually no competition with OCS pipelines already connected to gas reserves, and certainly no one will build 370 miles of offshore pipeline to duplicate Sea Robin's already-built, largely depreciated "gathering" facilities. FERC's characterization of Sea Robin as "one of numerous competing pipeline systems located on the OCS," FERC Opp. 5, is also misleading. Sea Robin is a monopolist with regard to all the existing producers captive to its system.

zation under section 7(b); (3) with *Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466, 467-69 (10th Cir. 1977), which holds that a change in jurisdictional service requires abandonment authorization even if physical service continues; and (4) with prior FERC orders recognizing that abandonment proceedings must be held if reclassified "gathering" facilities were (as here) formerly used to provide a jurisdictional service. Pet. 22-27.

Respondents have no answer for (and barely confront) these arguments. FERC tries to distinguish *Phillips* as a case in which a different company provided the substitute service, FERC Opp. 15, but that was not the basis of the Tenth Circuit's 7(b) holding. The Tenth Circuit held (in direct conflict with the court below) that abandonment was required when a jurisdictional service was replaced, even though the physical service was still provided. Pet. 25-26. FERC also attempts to distinguish its prior orders as applying to facilities, not services (FERC Opp. 15 n.3), but section 7(b) applies by its plain terms equally to both, and FERC's prior orders cannot be reconciled with the D.C. Circuit's holding that section 7(b) does not apply to facilities that are reclassified as nonjurisdictional, Pet. 25a. Williams cites the *Panhandle* case (Williams Opp. 16-17), but that case is inapposite because it involved a transfer of gas reserves and not facilities that had ever been used to render a jurisdictional service. 337 U.S. 498, 509 (1949). Williams also wrongly states that petitioners seek to apply section 7(b) to an exempt gathering service (Williams Opp. 17 n.12); to the contrary, the abandoned service subject to section 7(b) review is Sea Robin's prior jurisdictional receipt-to-delivery transportation service. In short, respondents cannot defend the indefensible. The court below erroneously held, in conflict with this Court and the Tenth Circuit, that jurisdictional service may be terminated without the public interest findings required by section 7(b).

3. FERC does not deny any of its prior admissions that prove the importance of this Court's immediate review: namely, that (1) billions have been invested in the OCS in

reliance on NGA jurisdiction; (2) regulatory uncertainty impedes OCS investment; (3) if Sea Robin's facilities can be reclassified as nonjurisdictional, almost any OCS pipeline can be; (4) Sea Robin will have market power if it prevails; and (5) OCS pipelines exercising market power in unregulated gathering facilities distort price signals, threaten production and competition, and harm consumers. See Pet. 2, 27-30; NGSA Br. 2-5. Indeed, FERC's Chairman recently questioned whether the *Sea Robin* test provides "sufficient incentives to develop offshore gas supplies needed to meet the country's demand for natural gas." *Jupiter Energy Corp.*, 103 FERC ¶ 61,184 (2003) (Wood, Chmn., concurring). The decision below controls the future of OCS pipelines generally – as is underscored by the participation of Williams, which has no interest in the Sea Robin pipeline, but owns many OCS pipelines that it seeks to free from NGA rate regulation.

Nonetheless, FERC and the other respondents contend that because FERC continues to exercise "in connection with" jurisdiction to require that Sea Robin's gathering rates are "just and reasonable," 15 U.S.C. § 717c(a), the whole of Sea Robin's system is currently subject to NGA rate regulation, and thus there is no "pressing need" for this Court's review.[5] Nothing could be further from the truth.

The critical fact, undisclosed by respondents, is that Sea Robin can terminate the FERC's "in connection with" jurisdiction at will. FERC exercises this rate jurisdiction over Sea Robin's gathering services only because Sea Robin is a "natural-gas company," *id.*, that is, a provider of jurisdictional transportation service, *id.* § 717a(6); *Shell Offshore, Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,254, 61,912 (2002). But FERC has stated that it "has no discretion to withhold [abandonment] authorization" if gathering facilities are spun down to an affiliate who provides no

[5] The settlement regarding Sea Robin's specific gathering rates was expressly without prejudice to the judicial proceedings in review of this decision. *Sea Robin Pipeline Co.*, 98 FERC ¶ 63,023, 65,092 (2002).

jurisdictional service. Thereafter it "has no authority to regulate [the affiliated] gatherer's rates or its terms and conditions of service." *Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,115, 61,435 (2001). The only exception recognized by FERC is a "sham" transaction where the pipeline and the affiliate "act[] in concert ... in a manner that frustrates the Commission's effective regulation of the interstate pipeline," *Shell Offshore*, 100 FERC at 61,913; FERC Opp. 17. Thus, if Sea Robin "spins down" its "gathering" facilities upstream of the Vermilion fork, under its precedents FERC will have no power to block the transaction or to regulate the affiliate's rates (unless the transaction is a sham): Sea Robin would be abandoning nonjurisdictional facilities over which it currently provides nonjurisdictional service. The same result would obtain if Sea Robin were simply to "spin off" its gathering facilities to an unaffiliated entity that provides no transportation service, commanding a high price that capitalizes the future monopoly rents from facilities that are free of NGA rate regulation.

FERC does not dispute any of the above, but maintains that there is "no evidence that Sea Robin is poised to cease service." FERC Opp. 15. Sea Robin has not spent almost a decade and untold legal fees litigating its jurisdictional status simply to maintain the *status quo ante* of rate regulation. Just as its peers have done, Sea Robin will undoubtedly spin its gathering facilities down or off once appeals are exhausted. At that point, NGA regulation will cease. In any event, a decision vesting a pipeline with the power to escape statutory rate jurisdiction by unilateral action is a significant regulatory change that itself warrants this Court's review.

If this Court denies this petition, Sea Robin and other OCS pipelines will not only escape FERC jurisdiction but also permanently avoid this Court's review. This Court will have no opportunity to decide these questions after Sea Robin spins its "gathering" facilities down or off; there will be no legal basis to challenge the transactions, and the jurisdictional

decision will be a final judgment that cannot be collaterally attacked. Every OCS pipeline will follow the same roadmap to avoid review: win reclassification of a part of its system as "gathering"; continue physical service but as combined jurisdictional transportation and nonjurisdictional gathering services (thus evading abandonment review); tolerate "in connection with" rate regulation until appeals are exhausted; then spin the gathering facilities down or off and escape both FERC's NGA regulation and judicial review. The effect on shippers and consumers will be to subject them to monopoly power, which is contrary to the very purpose of the NGA. If this Court agrees that the questions presented are important, it must decide these issues in this case.[6]

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition should be granted.

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[6] Respondents' invocation of the Outer Continental Shelf Lands Act ("OCSLA") is a red herring. OCSLA governs mineral leasing on the OCS, and a single subsection requires oil and gas pipelines to provide nondiscriminatory access to shippers. 43 U.S.C. § 1334(f). There is universal consensus that OCSLA is additive to FERC's NGA authority. *Id.* § 1334(f)(4); *Continental Oil Co.* v. *FPC*, 370 F.2d 57, 67 (5th Cir. 1966) ("The plain meaning and legislative history of the statutes show, at least in this case, that the OCSLA and the Gas Act must be applied reciprocally in furtherance of their individual regulatory purposes."); 124 Cong. Rec. H417-18 (daily ed. Jan. 31, 1978) (statement of Rep. Seiberling); *Alternative Methods for Regulating Natural Gas Pipeline Facilities & Servs. on the Outer Continental Shelf*, 4 FERC Statutes & Regs. ¶ 35,532, 35,730 (1998). OCSLA contains no specific ratemaking authority kindred to the NGA; the FERC has never asserted any such OCSLA power; and even FERC's OCSLA regulations requiring reports from pipelines have been enjoined as lacking statutory authority. *Chevron U.S.A., Inc.* v. *FERC*, 193 F. Supp. 2d 54, 68-75 (D.D.C. 2002), *appeal pending sub. nom. Williams Cos.* v. *FERC*, Nos. 02-5056, et al. (D.C. Cir. docketed Feb. 20, 2002). OCSLA thus has no bearing on the transportation/gathering distinction under the NGA as applied to offshore pipelines, and cannot diminish the impact on OCS production if pipelines are allowed to escape NGA rate regulation.

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Supreme Court, U.S.
FILED
JUN 23 2003
OFFICE OF THE CLERK

No. 02-1265

IN THE

Supreme Court of the United States

EXXONMOBIL GAS MARKETING COMPANY, A DIVISION OF EXXON MOBIL CORPORATION, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

On June 20th, after the filing of petitioners' reply brief, the United States Court of Appeals for the District of Columbia Circuit decided *Williams Gas Processing-Gulf Coast Co.* v. *FERC*, No. 01-1327 (D.C. Cir. June 20, 2003), which is reproduced in the Supplemental Appendix (Supp. App.) to this brief at 1a-19a. In *Williams*, the D.C. Circuit applied its jurisdictional ruling in this case (*ExxonMobil*) to permit the Federal Energy Regulatory Commission (FERC) to relinquish its Natural Gas Act (NGA) jurisdiction over large parts of *three* major offshore pipelines. Supp. App. 10a-13a. The court then applied its abandonment ruling below to permit those pipelines to transfer their reclassified "gathering" facilities to nonjurisdictional affiliates, without any determination by FERC that such abandonment was in the public interest. *Id.* at 14a-19a. As a result, those affiliates now hold monopoly power over their captive producers without *any* rate regulation by FERC (except for the one pipeline where the affiliate transfer was eventually declared a sham only after complaint and full evidentiary hearing, see *Shell Offshore, Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 100 FERC ¶ 61,254, 61,912-13 (2002)). *Williams* proves that the decision below has, for pipelines operating on the Outer Continental Shelf (OCS), effectively nullified the NGA and its purpose of preventing the exercise of monopoly power by pipelines, see *Public Service Commission* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 327-28 (1983), and *Williams* directly contradicts respondents' arguments against this Court's review of the decision in this case.

Three aspects of the *Williams* decision are important for this Court's consideration of the petition. First, *Williams* refutes respondents' arguments (FERC Opp. 14) that the court of appeals did not extinguish the rule of *Northern Natural Gas Co.* v. *State Corporation Commission*, 372 U.S. 84, 90 (1963), for offshore pipelines. Nowhere in the *Williams* decision does the court of appeals even *cite* to *Northern*

Natural or other cases holding that the gathering and other "[e]xceptions to the primary grant of jurisdiction in the section are to be strictly construed," *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690-91 (1947). Nowhere does the court of appeals attempt to apply this Court's definition of "gathering" as "narrowly confined to the physical act[] of ... preparing [gas] for the first stages of distribution," *Northern Natural*, 372 U.S. at 90. Indeed, rather than strictly construing exemptions from NGA jurisdiction, *Williams* reiterates that it will apply the contrary *ExxonMobil* rule of approving any FERC determination of "gathering" that is not "patently unreasonable." Supp. App. 19a; see also *id.* at 12a ("Given that FERC considered the pertinent factors, its conclusion was not arbitrary and capricious."). The net result in *Williams*, as in the case below, is that delivery of gas to the interstate carrier for a destination across state lines is not the marker of "transportation of natural gas in interstate commerce," despite this Court's many decisions that say it is. ExxonMobil Reply Br. 2-4. *Williams* thus confirms that the jurisdictional rule below is in stark conflict with the precedent of this Court and other courts of appeals. *Id.*; Pet. 14-16.

Second, *Williams* refutes the FERC's arguments opposing review of the D.C. Circuit's abandonment ruling below. The petition demonstrated that the D.C. Circuit's interpretation of section 7(b) contravened not only the plain language of the statute and the decisions of this Court and the Tenth Circuit, but also the FERC's longstanding precedent that a pipeline could not abandon previously certificated jurisdictional facilities that were reclassified as performing a "gathering" function unless the pipeline could prove that abandonment is in the public interest. Pet. 26 (quoting *Freeport-McMoRan, Inc.* v. *KN Energy, Inc.*, 64 FERC ¶ 61,189, 62,567 (1993), and *Trunkline Gas Co.*, 67 FERC ¶ 61,256, 61,859 (1994)). Without even attempting to reconcile those orders with the decision below, the FERC distinguished them as applying only to the abandonment of facilities, not of services. FERC

Opp. 15 n.3. But *Williams* has obliterated this claimed distinction, for it applies the *ExxonMobil* abandonment rule to jurisdictional facilities, as well as to jurisdictional services. Supp. App. 15a-17a. The D.C. Circuit further acknowledges that the *ExxonMobil* abandonment rule places it in direct conflict with the Fifth Circuit, which follows prior FERC precedent. *Id.* at 18a ("We part company with the Fifth Circuit's opinion in *Pacific Gas & Electric Co.* v. *FERC*, 106 F.3d 1190 (5th Cir. 1997), to the extent it holds that FERC has discretion to examine whether abandonment would be in the public interest, *id.* at 1197 ...."). *Williams* thus underscores the necessity of this Court's review of the abandonment ruling below.

Finally, and most critically, *Williams* refutes respondents' disingenuous claim that the decision below does not "present any issue of pressing importance regarding FERC's authority to regulate rates for offshore services on the OCS." FERC Opp. 9. FERC made this claim in reliance on its exercise of "in connection with" jurisdiction over Sea Robin's gathering rates, without disclosing that under its precedents NGA rate jurisdiction would disappear as soon as Sea Robin spins down its gathering facilities to a nonjurisdictional affiliate. ExxonMobil Reply Br. 8-10. That is precisely the situation in *Williams*, which expressly holds that when facilities are spun down, FERC "has no authority to exercise jurisdiction" under the NGA over rates and services. Supp. App. 18a. The malady of offshore pipelines possessing monopoly power over captive producers free of any NGA rate regulation is occurring right now on the OCS because of the decision below. Thus, the immediate resolution by this Court of these important questions of federal law is imperative.[1]

---

[1] The suggestion in *Williams* that, even absent rate regulation, producers can take comfort in the current open-access requirements of Order 636 and the Outer Continental Shelf Lands Act, Supp. App. 18a-19a, is unreasoned. Open-access requirements promote competition among *shippers* by providing access to pipeline facilities, but access alone cannot eliminate the *pipeline*'s monopoly power or its ability to extract

CONCLUSION

The petition should be granted.

Respectfully submitted,

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monopoly rents. Indeed, Order 636 requires open access by all NGA transportation pipelines, but in no way diminishes rate regulation of those pipelines under the NGA.

APPENDICES

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1327

WILLIAMS GAS PROCESSING—GULF COAST COMPANY, L.P. AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

DYNEGY MARKETING AND TRADE, *et al.*,
Intervenors.

Consolidated with
02–1006, 02–1007, 02–1051, 02–1052, 02–1053, 02–1072, 02–1073, 02–1074, 02–1075, 02–1076

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Before: Ginsburg, *Chief Judge*, and Rogers and Tatel, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Transcontinental Gas Pipe Line Corp. ("Transco") petitioned the Federal Energy Regulatory Commission ("FERC") for approval to transfer some of its pipeline facilities to its affiliate, Williams Gas Processing—Gulf Coast Co. ("WGP"), and to certify that the facilities serve gathering rather than transmission functions. FERC approved the applications in part and denied them in part, and Transco and WGP now challenge the portions of the orders

that denied the requests, contending that FERC's assertion of jurisdiction is contrary to precedent regarding the exemption of gathering facilities under the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b) (2000). A coalition of natural gas producers ("the Producers") also petitions the court for review, objecting to those portions of FERC's orders that granted the abandonment and reclassification of facilities as gathering for lack of a reasoned determination and as contrary to the public interest. Our review of these petitions is instructed by *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002), where the court stated that it will defer to FERC's reasonable determinations regarding gathering status under NGA section 1(b), 15 U.S.C. § 717(b). We hold that petitioners fail to demonstrate that FERC's choices are "unreasonable and its chosen line[s] of demarcation [are] not within a 'zone of reasonableness' as distinct from the question of whether the line[s] [are] 'precisely right.'" *ExxonMobil*, 297 F.3d at 1084; *see Conoco Inc. v. FERC*, 90 F.3d 536, 544 (D.C. Cir. 1996). Accordingly, we deny the petitions inasmuch as FERC considered the appropriate factors under the primary function test and sufficiently explained its reasoning.

I.

Section 1(b) of the NGA distinguishes between facilities that are used for "the transportation of natural gas in interstate commerce," which are subject to FERC's jurisdiction, and those used for "gathering," which are not. 15 U.S.C. § 717(b). "Gathering" is generally defined as "the process of taking natural gas from the wells and moving it to a collection point for further movement through a pipeline's principal transmission system." *Conoco*, 90 F.3d at 539 n.2 (citing *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990)). Although "[t]he line between jurisdictional transportation and nonjurisdictional gathering is not always clear," *Conoco*, 90 F.3d at 542, it is central to this case.

Since 1983, FERC has used a multi-factor "primary function test" to determine "whether a facility is devoted to the collection of gas from wells—gathering—or to the further ('downstream') long-distance movement of gas after it has been collected—interstate transportation." *Conoco*, 90 F.3d at 543 (citing *Farmland Indus., Inc.*, 23 F.E.R.C. ¶ 61,063, at 61,143 (1983); *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,987–88 (1990)). Under the primary function test, FERC considers six physical criteria: (1) the pipelines' length and diameter; (2) the central point in the field; (3) the facility's geographic configuration or pattern; (4) the location of compressors and processing plants, particularly where the pipelines are located behind the plant; (5) the location of wells along all or part of the facilities; and (6) the line's operating pressure. *ExxonMobil*, 297 F.3d at 1077 (citing *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1196 (D.C. Cir. 2000)). FERC also accounts for certain nonphysical factors, including: (1) the facility's purpose, location, and operation; (2) the pipeline owner's general business activity; (3) the objectives of the NGA and other pertinent legislation; and (4) the changing technical and geographic nature of exploration and production activities. *ExxonMobil*, 297 F.3d at 1077. No single criterion is dispositive, and not all of the factors apply in all situations. *Id.* (citing *Williams Field Servs. Group, Inc. v. FERC*, 194 F.3d 110, 116 (D.C. Cir. 1999); *Conoco*, 90 F.3d at 543).

FERC initially developed the primary function test for classifying onshore facilities, and it later modified the test in considering the increasing number of pipelines that were being constructed offshore on the Gulf of Mexico's Outer Continental Shelf ("OCS"), where gathering and distribution patterns are somewhat different. *ExxonMobil*, 297 F.3d at 1077 (citing *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989)). Because offshore pipelines often must transport raw gas over longer distances, FERC adopted a "sliding scale" approach that permitted gathering pipelines of greater

length and diameter in correlation with distance from shore and water depth. *ExxonMobil*, 297 F.3d at 1078 (citing *Amerada Hess*, 52 F.E.R.C. at 61,988). When FERC applied this modified approach in determining that the Sea Robin Pipeline Company's pipelines were jurisdictional transmission facilities, the Fifth Circuit reversed, questioning FERC's heavy emphasis on the facilities' size and on nonphysical factors and inviting FERC to reformulate its primary function test in light of the "physical, geographical and operational characteristics of pipelines in the OCS." *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 369–71 (5th Cir. 1997). On remand, FERC determined that the "behind-the-plant" test is not determinative of the gathering question offshore, and that instead it would look at the offshore system's configuration to locate a central point where gas is aggregated for transportation onshore. *Sea Robin Pipeline Co.*, 87 F.E.R.C. ¶ 61,384, at 62,425 (1999) (*Sea Robin II*). FERC explained that this central aggregation point is analogous to the "central-point-in-the-field" criterion for onshore systems and should be "given weight in identifying the demarcation point between gathering and transportation on OCS pipeline systems." *Id.* at 62,426. FERC also emphasized that it would focus primarily on physical factors, according only secondary importance to nonphysical factors. *Sea Robin Pipeline Co.*, 92 F.E.R.C. ¶ 61,072, at 61,284 (2000). This court subsequently held that FERC reasonably applied its reformulated primary function test to the Sea Robin system. *ExxonMobil*, 297 F.3d at 1087.

It was against the backdrop of the evolving primary function test and the distinction between jurisdictional transmission and exempt gathering facilities that Transco and WGP filed the applications at issue. In the parlance of the oil and gas industry, a "spindown" occurs when a natural gas transporter transfers operation of its facilities to a gathering affiliate. *See Conoco*, 90 F.3d at 541. In 1996, Transco sought FERC's authorization, pursuant to NGA section 7(b), 15

U.S.C. § 717f(b), to spin down a number of its facilities to WGP as part of a comprehensive corporate restructuring plan. Transco's application covered a large number of its facilities on seven different pipeline systems in Texas and Louisiana and offshore on the OCS. On the same day, WGP petitioned FERC for an order declaring that the facilities it intended to acquire from Transco—most of which FERC had previously certificated as transmission facilities under section 7(c) of the NGA—were gathering facilities exempt from its jurisdiction under section 1(b).

FERC dismissed the comprehensive application without prejudice. *Transcon. Gas Pipeline Corp.*, 76 F.E.R.C. ¶ 61,-317, at 62,543 (1996) ("*Comprehensive Order*"). FERC observed that "[t]he physical parameters of the subject facilities are massive and complex, involving over 3,100 miles of pipeline," and that the number of facilities included in Transco's application "is without precedent in prior 'spin-down' cases." *Id.* (footnote omitted). Explaining that important differences existed among the many pipelines that Transco included in its application, and that, "[a]t the very minimum, large portions of the facilities are clearly properly classified as jurisdictional transmission facilities," *id.* at 62,543, FERC also noted that "a decision to grant the requested abandonment in this case could set a precedent for ending NGA jurisdiction on the OCS, as it is likely that virtually every similar interstate pipeline on the OCS then would file a similar application." *Id.* at 62,542. Because "[n]either Transco nor WGP included in [its] pleadings an alternative request that [FERC] find specific parts of the facilities to be . . . nonjurisdictional," FERC dismissed the comprehensive application while stating that Transco and WGP could still file "another proposal requesting that [FERC] consider discrete portions of the facilities . . . to be gathering." *Id.* at 62,543. FERC denied the request for rehearing, noting that "the parties [did] not seek to parse the Transco facilities; rather, they continue[d] to insist that

[FERC] should find all the facilities at issue to be gathering." *Transcon. Gas Pipe Line Corp.*, 95 F.E.R.C. ¶ 61,396, at 62,475–76 & n.3 (2001) ("*Comprehensive Rehearing Order*").

Transco and WGP then filed three sub-spindown applications seeking permission to abandon and to reclassify discrete portions of the Transco systems. FERC approved the spindown of the North Padre Island and Central Texas Systems. *Transcon. Gas Pipe Line Corp.*, 96 F.E.R.C. ¶ 61,115, at 61,429 (2001) ("*North Padre/Central Texas Order*"). Relying on the reformulated primary function test set forth in *Sea Robin II*, 87 F.E.R.C. ¶ 61,384 (1999), FERC determined that each system featured a central aggregation point demarcating gathering and transmission functions. *North Padre/Central Texas Order*, 96 F.E.R.C. at 61,440–41 (2001). FERC applied similar reasoning in approving Transco's abandonment of portions of the North High Island and West Cameron systems, again pinpointing central aggregation points and identifying some, but not all, of the pipelines as serving gathering functions. *Transcon. Gas Pipe Line Corp.*, 96 F.E.R.C. ¶ 61,118, at 61,449, 61,458–60 (2001) ("*North High Island/West Cameron Order*"). Finally, FERC approved Transco's requested abandonment of the Central Louisiana facilities and, upon locating a central aggregation point at Vermilion Block 67, designated part of the system as gathering. *Transcon. Gas Pipe Line Corp.*, 96 F.E.R.C. ¶ 61,246, at 61,966 (2001) ("*Central Louisiana Order*"). Transco and WGP sought rehearing of those portions of the orders that designated parts of the systems as transmission facilities, and the Producers sought rehearing of the gathering determinations. FERC denied the rehearing requests. *Transcon. Gas Pipe Line Corp.*, 97 F.E.R.C. ¶ 61,296 (2001), *order on reh'g, North Padre/Central Texas Order*; *Transcon. Gas Pipe Line Corp.*, 97 F.E.R.C. ¶ 61,298 (2001), *order on reh'g, Central Louisiana Order*; *Transcon. Gas Pipe Line Corp.*, 97 F.E.R.C. ¶ 61,300 (2001), *order on reh'g, North*

High Island/West Cameron Order.

II.

Transco and WGP contend that FERC erred in rejecting their initial comprehensive application and improperly determined in the sub-spindown proposals that portions of the facilities were transmission rather than gathering. In considering these objections, the court will sustain FERC's factual findings if they are supported by "substantial evidence," 15 U.S.C. § 717r(b); *Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1115 (D.C. Cir. 1992) (per curiam), and will set aside FERC's actions if they are arbitrary and capricious, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court also applies *Chevron*'s familiar two-step framework to FERC's interpretation of section 1(b) of the NGA. *Exxon-Mobil*, 297 F.3d at 1083 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)). Moreover, the court is mindful that in "evaluating and balancing the several factors under the primary function test, [FERC] brings to bear its considerable expertise about the natural gas industry." *Conoco*, 90 F.3d at 544 (citations omitted). Consequently, "[t]he burden is on the petitioners to show that [FERC's] choices are unreasonable and its chosen line of demarcation is not within a 'zone of reasonableness' as distinct from the question of whether the line drawn by [FERC] is 'precisely right.'" *ExxonMobil*, 297 F.3d at 1084 (citations omitted).

A.

According to Transco and WGP, FERC misconstrued the comprehensive application as an "all or nothing" request—in other words, FERC misunderstood Transco and WGP as requesting that FERC allow them to abandon and reclassify all of their facilities or none at all. Transco and WGP maintain that their filings contained no such "all-or-nothing"

contingency. Because Transco and WGP failed to object to FERC's all-or-nothing characterization in seeking rehearing, they are precluded from raising this argument here. Section 19(b) of the NGA, 15 U.S.C. § 717r(b), bars the court from considering on review any objection that was not raised on rehearing, without good cause shown. *Fed. Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497–99 (1955); *ASARCO v. FERC*, 777 F.2d 764, 774–75 (D.C. Cir. 1985). Transco and WGP sought rehearing, challenging FERC's denial of the comprehensive application on a number of grounds, but, despite FERC's invitation to clarify that they were making an alternative request that FERC find that some parts of the facilities perform a gathering function, Transco and WGP nowhere requested that FERC sever the comprehensive application. Having filed a rehearing request that implicitly accepted the *Comprehensive Order*'s all-or nothing understanding, and not having shown good cause for failing to raise their severance argument before the agency, Transco and WGP are barred from challenging that understanding before the court. *See ASARCO*, 777 F.2d at 775.

FERC therefore was forced either to declare that all of the facilities at issue performed a gathering function or to deny the comprehensive application altogether. In this posture, jurisdiction and merits overlap, for the court must consider the merits of FERC's decision that at least one of the facilities performed a transmission function, thereby precluding approval of the all-or-nothing petition. FERC's decision in the *Comprehensive Order* was driven by the primary function analysis: FERC considered the relevant factors—including pipeline size and length, volume of gas, and water depth—and relied on no irrelevant factors. *Comprehensive Order*, 76 F.E.R.C. at 62,542-43 & nn.9-12. Transco and WGP contend that FERC was preoccupied with size, without regard to the "sliding scale" analysis required by *EP Operating*, 876 F.2d at 48–49. On the contrary, FERC's orders demonstrate that FERC was concerned with the transmission function of the

pipelines located closest to shore, in the shallowest waters, *id.* at 62,543—precisely the type of analysis contemplated by the sliding scale approach, *Exxon-Mobil*, 297 F.3d at 1078 (citing *Amerada Hess*, 52 F.E.R.C. at 61,988). Specifically, FERC found that Transco and WGP had "not adequately explained how . . . existing interstate pipeline facilities that are not located in deep OCS waters, i.e., waters in excess of 200 meters, can properly be reclassified as gathering lines under the 'primary function' test." *Comprehensive Order*, 76 F.E.R.C. at 62,543. In light of this analysis, it was reasonable for FERC to conclude that, "[a]t the very minimum, large portions of the facilities are clearly properly classified as jurisdictional transmission facilities." *Id.*

B.

Regarding two of the three sub-spindown proposals, Transco and WGP contend that FERC erred by failing to recognize the physical realities of gathering exhibited by all of the pipelines addressed in the *Central Louisiana Order* and the *North High Island/West Cameron Order*, and thus failed properly to apply the modified primary function test for offshore gathering systems. *See EP Operating Co.*, 876 F.2d at 48–49; *Amerada Hess*, 52 F.E.R.C. ¶ 61,268 (1990).

Transco and WGP contend that the *Central Louisiana Order* was in error for two primary reasons. First, they claim that FERC neglected to apply *Amerada Hess*'s sliding scale approach, which was designed to "allow the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area." *Amerada Hess*, 52 F.E.R.C. at 61,988. Transco and WGP maintain that FERC failed to recognize that the Central Louisiana system's spine-and-lateral configuration is characteristic of a gathering function, regardless of whether the system is on- or offshore, and that the offshore pipelines are longer and larger only because of the distances involved, not because their function is different. Second,

Transco and WGP contend that in concluding that Vermilion Block 67 marks the central aggregation point at which the offshore lines convert from gathering to transmission, FERC ignored the fact that the offshore pipelines are part of the spine-and-lateral gathering system, and that the Cow Island Junction is the proper point of central aggregation.

Because "[i]t is for [FERC], in the first instance, to determine the patterns of gathering and transportation in the offshore context," the court is "generally 'unwilling to review line-drawing performed by [FERC] unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.'" *ExxonMobil,* 297 F.3d at 1085 (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998)). The *Central Louisiana Order* makes clear that FERC properly considered the facilities' diameter (sixteen and twenty inches), length (forty-two miles), and the source of the pipelines' pressure (from the wellhead), as well as the absence of processing plants (which, FERC explained, means little offshore). 96 F.E.R.C. at 61,976. Transco and WGP have not carried their burden of showing that FERC's determination falls outside of a "zone of reasonableness." *ExxonMobil*, 297 F.3d at 1084. The court in *ExxonMobil* affirmed FERC's use of the central-aggregation-point test for offshore systems, *id.* at 1087, and a map of the Central Louisiana system shows that FERC reasonably concluded that the entire system features two aggregation points—one at Vermilion Block 67 and the other at Cow Island Junction. Given the system's configuration—a spine-and-lateral system in which many smaller pipelines branch off of a central "spine"—it was permissible for the Commission to find that some of the pipelines assume a transmission function when they converge at Vermilion Block 67, while others serve a gathering purpose until they reach Cow Island. 96 F.E.R.C. at 61,977. "Reasonable people may disagree as to where gathering ends and transportation begins," and this court will not substitute its judgment for a

FERC determination that is not "patently unreasonable." *ExxonMobil,* 297 F.3d at 1085; *see also Conoco*, 90 F.3d at 544.

The same deference principles apply to FERC's findings in the *North High Island/West Cameron Order*. This system is shaped like an inverted "Y" with two "legs"—the North High Island pipelines to the west and the West Cameron pipelines to the east—that converge onshore at the Station 44/Cameron Meadows complex. FERC determined that only a portion of the North High Island subsystem is nonjurisdictional, locating a central aggregation point at Block 10, *North High Island/ West Cameron Order*, 96 F.E.R.C. at 61,458–59, and that the entirety of the West Cameron subsystem serves a transmission function, *id.* at 61,459. Transco and WGP contend that FERC erred by evaluating the east and west legs independently rather than treating the Station 44/Cameron Meadows complex as the central aggregation point. According to Transco and WGP, the entire system, like the *Sea Robin* system, must be evaluated as a whole, and FERC cannot view each leg of the "Y" independently. But FERC explained that the two subsystems "generally operate independently, with the North High Island facilities collecting gas from the west in Offshore Texas and the West Cameron facilities collecting gas from the east in Offshore Louisiana." *Id.* at 61,458. Then, in assessing each subsystem, FERC noted the differences between the two. FERC reasonably concluded, in light of these differences, that the subsystems serve transmission functions before converging at the Station 44/Cameron Meadows complex. As in *ExxonMobil*, it was permissible for FERC to conclude "that different parts of the system required different jurisdictional treatment." *ExxonMobil*, 297 F.3d at 1085.

Transco and WGP next contend that FERC improperly designated a central aggregation point on the North High Island facility rather than finding the whole facility to be

gathering. FERC explained that "[t]he North High Island subsystem consists of approximately 174 miles of 4 to 30-inch pipeline," most of which is "relatively small, with the lines ranging from 4 to 24-inches in diameter." *North High Island/West Cameron Order*, 96 F.E.R.C. at 61,458. "The longest segment is a 63 mile, 24-inch Line C that connects all the upstream facilities with the plant complex onshore." *Id.* FERC concluded that "[a]lthough the North High Island Block 10 point does not exhibit as strong an indication of a marked physical change in facilities as was the case in *Sea Robin*," the interconnection of the 24-inch Line C with a 12-mile, 16-inch line at Block 10 nonetheless "serves as the central point of aggregation for the subsystem, where all the gas gathered upstream is delivered to a single point for transportation onshore." *Id.* at 61,458–59. In reaching this conclusion, FERC considered the length and diameter of the pipeline, the volume of gas transmitted, the shape of the subsystem, and the gas pressure. *Id.* at 61,459. Given that FERC considered the pertinent factors, its conclusion was not arbitrary and capricious. *See Conoco*, 90 F.3d at 544.

Transco and WGP further contend that FERC erred in concluding that all of the West Cameron facility is transmission. In assessing the West Cameron facility, FERC considered the length, diameter, and pressure of the pipeline on the West Cameron subsystem; the location of wells and lack of processing plants along the line; and the shape of the long, continuous pipeline connecting production in the OCS to the onshore processing facilities. *North High Island/West Cameron Order*, 96 F.E.R.C. at 61,459–60. Based on these factors, FERC found "that the West Cameron subsystem's primary function is that of a transmission facility, not a gathering one." *Id.* at 61,460. This conclusion was not arbitrary and capricious.

Transco and WGP contend, finally, that FERC failed to comply with its own precedent when it ignored the historical

evolution of the Central Louisiana and North High Island/West Cameron systems in determining their primary function. In *Enron Gulf Coast Gathering L.P.*, 95 F.E.R.C. ¶ 61,318 (2001), FERC stated that the fact that the pipelines in question "were built in separate stages over a number of years after" the original system's construction "in order to access new gas supplies on the OCS also speak[s] to their primary gathering function." *Id.* at 62,097 (footnote omitted). Transco and WGP contend that, consistent with that precedent, they presented FERC with detailed evidence showing that the systems' history and evolution suggest a primary gathering function. But FERC did not err in according little weight to this factor. Although FERC recognized in *Enron* that the historical evolution of the pipeline system may be relevant, it has not traditionally been a criterion in the primary function test. *See ExxonMobil*, 297 F.3d at 1077. Moreover, as FERC notes, the Fifth Circuit instructed FERC to afford nonphysical factors, such as a system's historical evolution, only secondary importance. *Sea Robin*, 127 F.3d at 371. In any event, this court has observed that "the historical classification" of a system is "of limited utility" in "'the wake of major regulatory changes in the natural gas industry'" effected by Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self–Implementing Transportation and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, F.E.R.C. Stats. & Regs. ¶ 30,939, *reh'g granted in part*, Order No. 636-A, F.E.R.C. Stats. & Regs. ¶ 30,950, *reh'g denied*, Order No. 636–B, 61 F.E.R.C. ¶ 61,272 (1992), *aff'd in part, rev'd in part sub nom. United Distrib. Cos. v. FERC*, 88 F.3d 1105 (1996) (per curiam) ("Order No. 636"). *ExxonMobil*, 297 F.3d at 1086-87 (quoting *Conoco*, 90 F.3d at 539). For reasons we explain in Part III, this analysis applies to Transco's facilities. Thus, FERC did not err in declining to classify the lines as gathering on the basis of their historical evolution.

III.

The Producers challenge approval of the abandonment and reclassification of Transco's facilities on the grounds that FERC: (1) failed to find that a change in circumstances justified revisiting an earlier classification of Transco's facilities as gathering; (2) misapplied the reformulated primary function test; and (3) neglected to conduct a sufficient public interest analysis. Each of these contentions lacks merit.

FERC has stated that "[e]xisting interstate pipelines and gathering facilities [will] retain their status barring some change in circumstances . . . ." *Gas Pipeline Facilities and Services on the Outer Continental Shelf*, 74 F.E.R.C. ¶ 61,222, at 61,757 (1996) ("*OCS Policy Statement*"). According to the Producers, Transco requested in 1990 that FERC certificate its facilities as transmission when Transco was restructuring from a merchant to a transporter. Because FERC granted Transco's request, the Producers maintain, the *OCS Policy Statement* required FERC to find that a change in circumstances justified revisiting the certification decision.

FERC explained in the orders on review that Order No. 636, which promoted the unbundling of pipeline services, effected significant changes in the industry, and that those changes justified Transco's abandonment request. *E.g., North Padre/Central Texas Order*, 96 F.E.R.C. at 61,434. FERC noted that Transco had sought to certificate its pipelines as transmission at a time when "Transco did not have a need to precisely distinguish between jurisdictional transmission and exempt gathering facilities," because those services could be bundled. *Id.* at 61,431. But "Transco, like many interstate pipelines, found after restructuring its system consistent with Order No. 636, and moving from a bundled, merchant function to an unbundled, transportation function, that it no longer needed all of its existing system facilities." *Id.* at 61,434. FERC accordingly found that Transco's requested

spindown was reasonable "because [its] facilities are no longer necessary for the service it currently provides." *Id.*

FERC's explanation is consistent with the major industry changes wrought by Order No. 636. *ExxonMobil*, for instance, the petitioners complained that FERC failed "to give weight to the previously 'settled status' of the classification of [the facilities in question] as engaged in jurisdictional transportation." *ExxonMobil*, 297 F.3d at 1086. But the court observed that "[w]hen interstate gas pipelines served the multi-function role of purchasing, gathering, transporting, and re-selling natural gas, *i.e.* bundled sales, the transportation/gathering jurisdictional question may have been of less consequence." *Id.* (citation omitted). The court then explained that FERC "has been struggling with the reclassification of facilities in the wake of the unbundling of gas sales and interstate transportation in Order No. 636." *Id.* at 1087 (citing *Conoco*, 90 F.3d at 539–41). Because Order No. 636 took effect after Transco's certification, the changes effected by the Order then were sufficiently significant to justify FERC's revisiting of Transco's classifications. The Producers object that if this rationale is accepted, then all prior determinations of transmission/gathering status could potentially be reopened, thereby upsetting producers' reliance and repose interests. Even so, the objection confirms the understanding that Order No. 636 worked a substantial change in the industry; it does not provide a reason for declining to revisit Transco's certification.

Furthermore, in light of the court's upholding in *ExxonMobil*, 297 F.3d at 1087, of FERC's modified primary function test as reasonable, the Producers' contention that FERC's orders are founded on a flawed reformulation of the primary function test necessarily fails. Similarly, the Producers' contention that FERC misapplied the primary function test by according determinative weight to the central-aggregation-point factor also fails. Although FERC

maintains that the Producers waived this challenge by failing to raise it on rehearing, *see* 15 U.S.C. § 717r(b); *Colorado Interstate Gas*, 348 U.S. at 497-99; *ASARCO*, 777 F.2d at 774-75, their argument before FERC that it erred in selecting the specific points along Transco's system where gathering ends and transmission began was sufficient to preserve the objection. While the Producers maintain that FERC erred in finding that virtually all facilities located upstream from the central aggregation point are gathering and in failing to reconcile its conclusions with prior precedents, the orders demonstrate that FERC adequately considered a range of relevant factors—the facilities' length and diameter, the volume of gas transmitted, the pipelines' configuration, the location of compression facilities and processing plants, the source of pressure, and the presence of a central aggregation point. *North Padre/Central Texas Order*, 96 F.E.R.C. at 61,440-42; *North High Island/West Cameron Order*, 96 F.E.R.C. at 61,458–60; *Central Louisiana Order*, 96 F.E.R.C. at 61,976-77. FERC did "not consider any one factor to be determinative," *North Padre/Central Texas Order*, 96 F.E.R.C. at 61,442, and its determinations were consistent with prior precedent. Although the Producers contend that FERC's decisions in *Seahawk Shoreline System*, 93 F.E.R.C. ¶ 61,097 (2000), *reh'g denied*, *Seahawk Transmission Co.*, 95 F.E.R.C. ¶ 61,342 (2001), and *Venice Gathering Co.*, 97 F.E.R.C. ¶ 61,045 (2001), are dispositive because the size of those pipelines was the same as the size of Transco's facilities, other relevant differences remain, including the systems' proximity to shore and their connections to other lines. Hence, "it is entirely appropriate for FERC to proceed on a case-by-case basis. . . ." *ExxonMobil*, 297 F.3d at 1087 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947)). FERC gave reasoned consideration to each of the pertinent factors, and its factual conclusions are supported by substantial evidence in the record. *ExxonMobil*, 297 F.3d at 1084 (citations and quotations omitted).

Producers finally contend that even if the facilities are properly classified as gathering, the NGA required FERC to make a public interest finding before permitting Transco to abandon the facilities by sale to a nonjurisdictional affiliate. *See* 15 U.S.C. § 717f(b); *Transcon. Gas Pipe Line Corp. v. Fed. Power Comm'n*, 488 F.2d 1325, 1328 (D.C. Cir. 1973) (per curiam); *Michigan Consol. Gas Co. v. Fed. Power Comm'n*, 283 F.2d 204, 214 (D.C. Cir. 1960). The Producers explain that the facilities in question were certificated as transmission, and the abandonment of certificated facilities is subject to FERC's public interest standard. In a public interest analysis, "the burden of proof is on the applicant for abandonment to show that the 'public convenience and necessity' permits abandonment, that is, that the public interest 'will in no way be disserved' by abandonment." *Transcon. Gas*, 488 F.2d at 1328 (quoting *Michigan Consol.*, 283 F.2d at 214). The Producers contend that FERC failed adequately to consider the anti-competitive effects of Transco's abandonment.

In FERC's view, "the issue of competition" is not "relevant to whether or not [FERC] will regulate an affiliated gatherer's rates or terms and conditions of service after it acquires abandoned facilities," because FERC "has no authority under the NGA to regulate a gatherer's rates or its terms and conditions of service." *North High Island/West Cameron Order*, 96 F.E.R.C. at 61,454 (citing *Conoco*, 90 F.3d 536). Put more simply, "NGA § 7(b) does not require [FERC] authorization for a transfer of gathering facilities." Respondent's Br. at 50. As the court has explained, "section 7(b) only applies to jurisdictional facilities, and 'do[es] not expand [FERC's] § 1(b) jurisdiction.'" *ExxonMobil*, 297 F.3d at 1088 (quoting *Conoco*, 90 F.3d at 553); accordingly, the petitioner in *ExxonMobil* could not use section 7(b) to "bootstrap" FERC jurisdiction over a set of gathering facilities that the petitioner sought to reclassify (but not to abandon). *Id.* Although the situation here is slightly different than in

ExxonMobil, because Transco wishes to abandon its pipelines rather than simply reclassify them, FERC properly determined that under NGA section 7(b) it had no discretion to deny abandonment of Transco's facilities that it found were primarily functioning as gathering. *See, e.g.*, *North Padre/ Central Texas Order*, 96 F.E.R.C. at 61,435. We part company with the Fifth Circuit's opinion in *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997), to the extent it holds that FERC has discretion to examine whether abandonment would be in the public interest, *id.* at 1197, for once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility.

As to shippers' anti-competition concerns, FERC explained that even though it lacked the authority to deny the abandonment, the concerns were unfounded because the abandonment was "consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry." *North High Island/ West Cameron Order*, 96 F.E.R.C. at 61,454 (citing *Northern Natural Gas Co.*, 93 F.E.R.C. ¶ 61,101, at 61,273 (2000)). FERC further noted that "the facilities at issue here are located on the OCS and will become subject to the [Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-56 (2000),] upon approval of the spindown," thereby limiting any potential anticompetitive effects. *North Padre/ Central Texas Order*, 96 F.E.R.C. at 61,435. Under FERC's OCSLA regulations, WGP is required to report the terms under which it provides service to shippers; a shipper can file a complaint if it believes either Transco or WGP has violated its statutory obligations and "the Commission will investigate any such complaint in a timely manner." *Id.* (citing 18 C.F.R. § 332.2, 332.206 (2000)). Thus, FERC has taken the long view, concluding that Order No. 636's unbundling policies create competitive conditions and that, combined with the

standards of conduct for gathering facilities in Transco's tariff, the OCSLA sufficiently guards against the exercise of monopoly power. *See United Distrib. Cos.*, 88 F.3d at 1139.

Accordingly, because the court is "'generally unwilling to review line-drawing performed by [FERC] unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem,'" *ExxonMobil*, 297 F.3d at 1085 (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998)), and FERC's conclusions were reasonable, we deny the petitions for review.

Supreme Court, U.S.
FILED
SEP 3 2003
OFFICE OF THE CLERK

Nos. 02-1215 and 02-1265

In the Supreme Court of the United States

PRODUCER COALITION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

EXXONMOBIL GAS MARKETING COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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In the Supreme Court of the United States

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SUPPLEMENTAL BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

This supplemental brief is filed pursuant to Rule 25.5 of the Rules of this Court to bring to the attention of the Court action by the Federal Energy Regulatory Commission (FERC) that was taken after the date that the brief opposing the petitions for a writ of certiorari was filed in this case.

1. The questions presented in these petitions for a writ of certiorari are (i) whether FERC reasonably

concluded that portions of Sea Robin's offshore pipeline system involve the "gathering" of natural gas within the meaning of Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b), to which the NGA does not apply, and (ii) whether FERC was required to determine that reclassification of a portion of Sea Robin's system as non-jurisdictional furthered the public interest under Section 7(b) of the NGA, 15 U.S.C. 717f(b). On August 14, 2003, FERC issued a public Notice stating that on September 23, 2003, FERC will convene a public conference "to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be." *Notice of Public Conference, Application of the Primary Function Test for Gathering on the Outer Continental Shelf*, Docket No. AD03-13-000 (Aug. 14, 2003) (App., *infra*, 1a-12a). In issuing the Notice, the Commission observed that its approach to distinguish between transportation and gathering seemed to work well for facilities onshore, and that a 1996 policy statement addressing the status of offshore facilities in deep waters had generated very little controversy. In the shallow areas of the OCS, however, the Commission noted that the status of facilities remained unsettled. *Id.* at 4a-6a, 9a. The Commission stated that its objective in issuing the Notice was to develop a "clear, consistent approach to offshore gathering * * * to protect producers and customers from the market power of third party transporters and to avoid different jurisdictional outcomes for companies that perform essentially the same economic function." *Id.* at 2a.

In setting forth the background of the issues to be addressed, FERC described at some length the classifi-

cation determination at issue in the petitions in this case—FERC's decision to reclassify portions of Sea Robin's offshore system pipeline as gathering facilities (App., *infra*, 6a-9a)—as well as other such determinations. FERC then expressed a concern that the test it has used in classifying those offshore facilities may be of "uneven" utility and produce "uncertainty" in shallow waters because it does not prioritize its factors or indicate how inconsistent factors will be resolved. *Id.* at 9a. FERC thus concluded that its test may "produce different regulatory results for competitors who perform essentially the same economic function." *Id.* at 10a. FERC also observed that it "continues to receive requests to reclassify jurisdictional transmission facilities as gathering, over the objection of customers who have been served through the facilities." *Id.* at 9a. FERC accordingly concluded that it would convene the public conference "to hear suggestions from interested persons on developing a new test for gathering on the OCS that is reasonably objective and that furthers the regulatory goals of the Natural Gas Act." *Id.* at 10a.

FERC stated that interested persons wishing to make formal statements at the conference on September 23, 2003, should be prepared to address four specific questions, as follows:

> 1. To what extent should a gathering test * * * be based on the length and diameter of the pipeline, the extent the facilities are operationally integrated with either production or transportation facilities, the function of compression in relation to the facilities, and the proximity to the pipeline transportation grid?
>
> 2. To what extent should the location of processing plants, the central point of aggregation, the operat-

ing pressure of a line, and geographic configuration of facilities, be considered relevant in evaluating the status of facilities on the OCS? What are the advantages and disadvantages of relying on these factors? Are there any other factors that should be considered?

3. What should be the relevance of non physical factors such as a facility's history of regulation or the major business purpose of an owner?

4. If formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under section 7(b) of the Natural Gas act before the facilities may be transferred to another company?

App., *infra*, 11a.

2. In its brief in opposition (at 9-18), the government argues that the certiorari petitions should be denied because the court of appeals correctly held that FERC's reclassification decision was reasonable under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because that factbound decision does not conflict with any decision of another court of appeals or this Court, and because in this case the impact of the questions presented on petitioners is limited or speculative. FERC's Notice of August 14, 29003, provides a further reason for the Court to deny certiorari. This Court should not address the legal, factual, and policy issues raised by the certiorari petitions before FERC has had the opportunity to receive public comment upon and consider whether (1) the agency should reformulate its test for determining nonjurisdictional gathering in the shallow waters of the OCS, and if so, what the relevant

test and criteria should be, and (2) FERC should conduct abandonment proceedings for those formerly certificated facilities determined to be engaged in gathering. As FERC concluded, relevant to those questions are policy issues concerning "inconsistent classification and regulatory treatment" of similarly situated competitors as well as the impact on "customers who may have made investments relying on the regulated status of a transporter." App., *infra*, 10a.

Those and other policy issues are best directed in the first instance to FERC, which may reformulate its jurisdictional test for determining whether facilities operating in the shallow waters of the OCS are engaged in jurisdictional transportation or nonjurisdictional gathering. A new test would govern future requests to reclassify previously certificated transmission facilities. Moreover, should FERC adopt a new test, petitioners or Sea Robin would be free to petition the FERC to reclassify some or all of Sea Robins facilities under 15 U.S.C. 717c, 717d, and 717f. Finally, because any review of the substance and application of the Commission's test would be subject to review under *Chevron*, this Court should decline review of the court of appeals' decision in view of FERC's Notice concerning the possible reformulation of its test.

Respectfully submitted.

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SEPTEMBER 2003

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Application of the Primary Function Test for Gathering on The Outer Continental Shelf — Docket No. AD03-13-000

NOTICE OF PUBLIC CONFERENCE

(August 14, 2003)

Take notice that on September 23, 2003, the Commission will convene a public conference in the above captioned proceeding. The purpose of the conference will be to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be.

The Commission has considered its offshore gathering policy a number of times in the past decade.[1] Never-

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[1] *See generally* Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates—Issues Related to Rates and Terms and Conditions of Service, Docket No. RM94-4-000, Notice of Public Conference, 65 FERC ¶ 61,136 (1993); Gas Pipeline Facilities and Services on the Outer Continental Shelf–Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, Docket No. RM96-5-000, Policy Statement, 74 FERC ¶ 61,222 (1996) (1996 Policy Statement); *Chevron U.S.A., Inc.* v. *FERC*, 193 F. Supp. 2d 54 (D.D.C., January 11, 2002), *appeal pending sub nom. Williams Companies, et al.* v. *FERC*, No. 02-5056 (D.C. Cir.) (appeal of district court ruling on motion that FERC did not have

theless, a satisfactory definition of gathering under the Natural Gas Act has remained elusive. A clear, consistent approach to offshore gathering is needed to protect producers and customers from the market power of third party transporters and to avoid different jurisdictional outcomes for companies that perform essentially the same economic function.

Background

A. Evolution of the Primary Function Test

Although section 1(b) of the Natural Gas Act states that the provisions of that act do not apply "to the production or gathering of natural gas," the act itself does not define those terms. The Commission has defined gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line."[2] The Supreme Court has added that "production" and "gathering" are terms "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution."[3] These

authority under the Outer Continental Shelf Lands Act (OCSLA) to issue regulations requiring gas service providers on the Outer Continental Shelf (OCS) to submit quarterly reports of services provided).

[2] *Lomak Petroleum, Inc.* v. *FERC*, 206 F.3d 1193, 1196 (D.C. Cir. 2000), *quoting from Barnes Transportation Company*, 18 FPC at 372 (1957). *See also Conoco, Inc.* v. *FERC*, 90 F.3d 536, 539 n.2 (D.C. Cir. 1996) ("Gathering is the process of taking natural gas from the wells and moving it to a collection point for further movement through the pipeline's principal transmission system.") (quoting *Northwest Pipeline Corp.* v. *FERC*, 905 F.2d 1403, 1404 n.1 (10th Cir. 1990)).

[3] *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 90 (1963).

definitions have been useful in describing gathering as a concept. Nevertheless, as the courts have recognized, "the line between gathering and transportation is inherently elusive."[4] Attempts to establish a functional test, useful in the context of specific proceedings, resemble the pursuit of a desert mirage. Historically, the tendency has been to announce a particular physical characteristic that could be used to identify nonjurisdictional gathering, only to substitute other criteria later to reflect changes in the industry or in the evolution of Commission policy.[5] In *Farmland Industries, Inc.*,[6] the Commission identified a number of factors for

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[4] *Exxon Mobil Gas Marketing Company* v. *FERC (Exxon)*, No. 00-1355 (D.C. Cir. August 6, 2002) (Judge Edwards dissenting) slip op. at 18, *citing Conoco, Inc.* v. *FERC*, 90 F. 3d 536 at 542 (D.C. Cir. 1996).

[5] For many years, the Commission employed two principal tests to differentiate (primarily onshore) transportation from gathering facilities. The "behind-the-plant" test presumes that all facilities located between the wellhead and a processing plant are non-jurisdictional gathering lines, while facilities downstream of the processing plant are presumptively transportation facilities. *See Phillips Petroleum Co.*, 10 FPC 246 (1951), *rev'd in part on other grounds sub nom. Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954). For gas that required no processing, the "central-point-in-the-field" test applied, under which lateral lines that collect gas from separate wells before converging into a larger single line—typically at the point where the gas is compressed for transportation by the pipeline—were classified as gathering facilities. *E.g.*, Barnes, *supra*

[6] 23 FERC ¶ 61,063 at 61,143 (1983). The Commission later added a number of "non-physical" criteria, including (1) the purpose, location and operation of a facility; (2) the business of the owner; (3) whether the jurisdictional determination is consistent with the objectives of the NGA and other legislation; and (4) the changing technical and geographic nature of exploration and production. *Amerada Hess Corp.*, 52 FERC ¶ 61,268 at 61,844-45

consideration in analyzing the section 1(b) gathering test, and stated that "the ultimate test is whether the primary function can be classified as transportation or gathering." The primary function test factors included:

- the length and diameter of a pipeline (longer and wider pipe indicating transportation);
- the central point in a field;
- the pipeline's geographic configuration (a web-like pattern, for example, suggesting a gathering function)
- location of compressors and processing plants (i.e., the "behind the plant" test);
- the location of wells along all or part of the facilities (typically indicating gathering); and
- operating pressure of a line, with higher pressure generally associated with the need to propel gas in a transportation function

The primary function test has been relatively satisfactory for analyzing onshore facilities. Offshore, however, the test has proven more difficult to apply.[7] Thus,

(1990). Under the primary function test, no one factor is determinative, nor do all factors apply in every situation. *See, e.g., Williams Field Services*, 194 F.3d at 116; *Farmland*, 23 FERC at 61,143.

[7] As more new facilities were constructed offshore on the OCS, where the pattern of gathering and distribution differs, the applicability of the factors was questioned. Specifically, it is often not feasible to process raw gas on open water. As a result, pipelines on the OCS typically do not gather gas at a local, centralized point within a producing field as they would onshore, to prepare it for traditional transportation. Rather, on the OCS, they construct relatively long lines to carry the raw gas from offshore platforms, where after production only rudimentary gas treatment takes

in *EP Operating Co.* v. *FERC*, 876 F.2d 46, 48-49 (5th Cir. 1989), the Commission initially ruled that under the primary function test the offshore platform where initial gas treatment took place constituted a "central point in the field" where the gathering function was complete, and therefore the 51-mile long, 16-inch diameter OCS pipeline downstream of the platform at issue in that case was a jurisdictional transportation facility. The court reversed that finding, holding that while the length and diameter of pipeline facilities might indicate a transportation function onshore, those factors had less weight in the offshore context because of the longer distances between the point of production in deep water and the nearest connection with an interstate pipeline. The court further questioned the validity of a central-point-in-the-field analysis applied to unitary OCS structures.

In response, the Commission modified its primary function test for the OCS, stating that as drilling operations pushed further offshore from existing interstate pipeline connections, it would apply a sliding scale to allow for the increasing length and diameter appropriate for gathering lines in correlation to the distance from shore and the water depth of the offshore production area.[8] Later, following a conference on offshore gathering in Docket No. RM96-5-000, the Commission issued a policy statement announcing that it would "presume facilities located in deep water [more than

place (primarily to remove water), to the shore or a point closer to shore where it can be processed into "pipeline quality" gas that can be transported by an interstate pipeline.

[8] *See Amerada Hess*, 52 FERC at 61,988 (1990).

200 meters] are primarily engaged in gathering or production."[9]

As with onshore facilities, the use of the primary function test, as modified by the policy statement for deepwater facilities, seems to be workable, and there has been relatively little controversy concerning its application in recent years. Efforts to apply the primary function test to offshore facilities in the shallow OCS, however, have been contentious.

B. The Sea Robin Pipeline

Difficulties applying the primary function test to offshore facilities were highlighted by the Commission's decision in *Sea Robin Pipeline Company (Sea Robin).*[10] Sea Robin's offshore pipeline facilities were certificated as jurisdictional transmission facilities by the Commission in 1969. The system consists of 438 miles of pipeline that transports unprocessed gas from shallow water on the OCS to a processing plant onshore. The system is configured in the form of a "Y". Along the two arms of the "Y", 45 lateral lines with diameters ranging from 4.5 to 30 inches are connected to 67 receipt points located on production platforms, or at subsea taps. Through those upstream arms, Sea Robin moves the gas to a manned platform with two turbine compressor units at the fork of the "Y" closer to shore. The bottom line of the "Y", from the platform to shore, consists of 66.3 miles of 36-inch pipeline. Along this segment the gas is mingled with additional gas from four platforms.

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[9] *See* 1996 Policy Statement, note 1 *supra.*

[10] 71 FERC ¶61,351 (1995), *reh'g denied*, 75 FERC ¶61,332 (1996).

In response to a request to reclassify the Sea Robin facilities from transmission to gathering, the Commission found that the primary function of Sea Robin's entire system was and continued to be jurisdictional transportation. In reaching that conclusion, the Commission emphasized the length and size of Sea Robin's pipeline, and also certain non-physical factors, such as the reliance of shippers in the original jurisdictional determination. The U.S. Court of Appeals for the Fifth Circuit remanded that decision.[11] In doing so the court said the Commission had relied too heavily on the size of Sea Robin's system as a determinative factor and did not give enough consideration to the different nature of gathering on the OCS. The court also faulted the Commission for reliance on non-physical considerations, such as Sea Robin's ownership and shipper expectations. The court specifically found that the Commission's consideration of a "regulatory gap" in the absence of Natural Gas Act jurisdiction was inappropriate: "Need for regulation cannot alone create authority to regulate."[12]

In its decision, the court suggested that the primary function test could be adapted to the operational characteristics of the OCS, so that portions of its system could be considered to be predominantly gathering and other parts predominantly transportation. On remand, then, the Commission adopted this suggestion and reformulated the primary function test to draw the jurisdictional line at an internal point on the Sea Robin

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[11] *Sea Robin Pipeline Company* v. *FERC*, 127 F.3d 365 (5th Cir. 1997).

[12] *Id.* at 371.

system, at the junction of the "Y".[13] The Commission concluded that the part of Sea Robin's pipeline facilities from the platform to shore was a jurisdictional transportation system. Upstream of that point the two legs of the "Y" formed a non-jurisdictional gathering system.

In reformulating its primary function test, the Commission concluded that the "behind-the-plant" factor is not necessarily determinative of where gathering ends when applied to offshore facilities. In addition, the Commission announced that

> where a pipeline system includes a facility where gas is delivered by several relatively small diameter lines for aggregation and preparation for further delivery onshore through a single larger diameter pipeline, the location of that collection facility will be afforded considerable weight for purposes of identifying the demarcation point between gathering and transportation on OCS systems.[14]

Although not all OCS pipeline systems exhibit such a centralized aggregation point, e.g., facilities with a straight-line or spine-and-lateral type configuration, the presence of such a location would be considered the offshore analogue of the onshore "central-point-in-the-field" criterion.

The Commission's decision on remand, based on its reformulated test that included the central point of aggregation as a factor offshore, was upheld by the U.S.

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[13] *Sea Robin Pipeline Company*, Order on Remand, 87 FERC ¶ 61,384 (1999) (Comm. Bailey dissenting), *rehearing denied*, 92 FERC ¶ 61,072 (2000).

[14] 87 FERC at 62,248.

Court of Appeals for the District of Columbia Circuit in *Exxon* (note 4 *supra*).[15]

C. The "Reformulated, Modified Primary Function Test"

Despite the several modifications of the primary function test described above, its utility in identifying nonjurisdictional gathering facilities remains uneven. As mentioned, the rule seems to work fairly well onshore, possibly because where other factors are not conclusive, there is usually a processing plant located at the end of a gathering system that serves as a logical demarcation point between jurisdictional and nonjurisdictional systems. Also, after an initial round of decisions interpreting the 1996 Policy Statement applying the primary function test to facilities located in deep water beyond the OCS, there has been relatively little controversy. In the shallow areas on the OCS, on the other hand, the status of facilities remains unsettled. The Commission continues to receive requests to reclassify jurisdictional transmission facilities as gathering, over the objection of customers who have been served through the facilities. In these types of cases, the correct interpretation of the primary function test is usually the main issue.

Based on the number of contested cases presented to us, we are concerned about the high degree of uncertainty that seems built into the primary function test as applied offshore. The primary function test lists numerous factors for consideration, with no one factor having priority. Thus, for example, the size of a parti-

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[15] *See also Williams Gas Processing-Gulf Coast Company, L.P. et al.* v. *FERC*, No. 01-1327 (D.C. Cir. June 20, 2003).

cular system may suggest that it is transmission, but the configuration may suggest gathering. The primary function test does not indicate how such inconsistencies should be resolved. The result, over time, has been the gradual reclassification of more and larger systems as gathering, even in cases where systems had been regulated for many years under the Natural Gas Act. Systems with generally similar physical characteristic may have a different regulatory status because of relatively minor physical differences. This result can produce different regulatory results for competitors who perform essentially the same economic function. It is also seems unfair to customers who may have made investments relying on the regulated status of a transporter, only to find themselves subject to the market power of that transporter in its new deregulated form. The "need for regulation" may not create authority to regulate; on the other hand, inconsistent classification and regulatory treatment cannot be what Congress intended when it established a comprehensive scheme of federal regulation that included transportation from the OCS.

Public Conference

The Commission is convening a public conference to hear suggestions from interested persons on developing a new test for gathering on the OCS that is reasonably objective and that furthers the regulatory goals of the Natural Gas Act. (The conference will not include the policy adopted for deepwater facilities in Docket No. RM96-5-000.) A new test should ensure that similar facilities are subject to similar regulatory treatment. It should also provide incentives for investment in production, gathering, and transportation infrastructure offshore, without subjecting producers to the unregulated

market power of third party transporters. Persons who appear at the conference should be prepared to indicate how the Commission's definition of gathering can be changed to achieve these goals. Persons seeking to make formal statements at the public conference should be prepared to address questions set forth below. Other questions may arise during the course of the proceedings.

Questions

1. To what extent should a gathering test that be based on the length and diameter of the pipeline, the extent the facilities are operationally integrated with either production or transportation facilities, the function of compression in relation to the facilities, and the proximity to the pipeline transportation grid?

2. To what extent should the location of processing plants, the central point of aggregation, the operating pressure of a line, and geographic configuration of facilities, be considered relevant in evaluating the status of facilities on the OCS? What are the advantages and disadvantages of relying on these factors? Are there any other factors that should be considered?

3. What should be the relevance of non physical factors such as a facility's history of regulation or the major business purpose of an owner?

4. If formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under section 7(b) of the Natural Gas act before the facilities may be transferred to another company?

Procedures

The public conference convened by this notice will be held on September 23, 2003 at the offices of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. All interested persons are invited to attend. Persons interested in speaking or making a presentation should indicate their interest no later than September 3, 2003 by a letter addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, and should refer to Docket No. AD03-13-000. Each request to participate must include the name of a contact person, their telephone number and e-mail address. There is no need to provide advance notice to the Commission simply to attend the conference.

Comments addressing the questions set out in this notice may also be filed by September 3, 2003. Every effort will be made to accommodate requests to make presentations, but depending on the number of requests received, a limit may have to be placed on the number of presenters and the time allowed for presentations.

Members of the Commission intend to participate in the public conference and will reserve time for questions and answers. In a subsequent notice, we will provide further details on the conference, including the agenda and a list of participants, as plans evolve. For additional information, please contact Gordon Wagner, Office of General Counsel, phone 202-502-8947, e-mail: gordon.wagner@ferc.gov.

Magalie R. Salas
Secretary

(9)

Supreme Court, U.S.
FILED
SEP 12 2003
OFFICE OF THE CLERK

No. 02-1265

IN THE
Supreme Court of the United States

EXXONMOBIL GAS MARKETING COMPANY, A DIVISION OF EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SECOND SUPPLEMENTAL BRIEF

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SECOND SUPPLEMENTAL BRIEF

On August 14, 2003, the Federal Energy Regulatory Commission (FERC) issued a notice of a public conference "to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be." FERC Supp. Br. App. 1(a). In the notice, FERC concedes that the test it applied below (the *Sea Robin* test, *id.* at 6a-8a) is arbitrary and unworkable. FERC characterizes its efforts to formulate a functional test as "resembl[ing] the pursuit of a desert mirage." *Id.* at 3(a). FERC admits that the *Sea Robin* test brings a "high degree of uncertainty" to offshore jurisdictional determinations; grants "[s]ystems with generally similar physical characteristic[s] ... a different regulatory status because of relatively minor physical differences"; "produce[s] different regulatory results for competitors who perform essentially the same economic function"; and "unfair[ly]" subjects producers "who may have made investments relying on the regulated status of the transporter ... to the market power of that transporter in its new deregulated form." *Id.* at 9a-10a. Most importantly, FERC concedes that the test it employed below is contrary to the statute: "inconsistent classification and regulatory treatment cannot be what Congress intended when it established a comprehensive scheme of federal regulation that included transportation from the OCS." *Id.* at 10a.

In the notice, FERC also asks for comments regarding its authority to deny an application for abandonment under section 7(b) of the NGA. Specifically, the Commission asks whether it has authority to deny the abandonment by transfer to another company of certificated facilities that are subsequently found to perform a gathering function. *Id.* at 11a. The question implicitly poses the issue already resolved in opposite ways by the D.C. Circuit and the Fifth Circuit: Does FERC have the authority to deny abandonment in such circumstances unless FERC first determines that

abandonment is in the public interest? See Petitioners' First Supp. Br. 2-3.

On the jurisdictional issue, FERC's new diagnosis of the problems with the *Sea Robin* test is exactly right (and reflects the position of petitioners), but its proposed remedy is wrong. FERC in its supplemental brief urges the Court to deny this petition, and the related petition in No. 02-1215, while it reconsiders what factors to add to (or delete from) its test, and what weight to give such factors. FERC Supp. Br. 4-5, app. at 11(a). FERC maintains that the basic jurisdictional terms "transportation" and "gathering" in section 1(b) of the Natural Gas Act are ambiguous, and that their interpretation is committed to the FERC under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). FERC Supp. Br. 4-5. FERC contends that this Court should deny review because the issue under the NGA is whether the Commission's new test would be a reasonable interpretation of the statute under *Chevron*. *Id.* at 5. As to the abandonment issue, FERC is silent as to why this Court should deny review of the issue pending the Commission's action, if any, emanating from its newly announced conference.

While FERC is right to question the positions it has taken under sections 1(b) and 7(b) of the NGA, its eleventh-hour notice of conference forms no basis to deny the petitions. Instead, the notice reinforces the urgent need for this Court to grant the petitions. On the jurisdictional issue, any future reformulation of the *Sea Robin* factors will not cure the fundamental conflict between the decision below and this Court's authoritative construction of section 1(b). Similarly, on abandonment, any future action by the Commission cannot resolve the split between the D.C. Circuit and the Fifth Circuit. If the Commission changes its mind, it will not be the first time, as the Commission's original position was in line with that of the Fifth Circuit. See *Trunkline Gas Co.*, 67 F.E.R.C. ¶ 61,256, 61,859 & n.17 (1994). Currently, it agrees

with the D.C. Circuit. Delay to allow FERC time to reverse itself again will not obviate the need for this Court to resolve the conflict.

1. On the issue of jurisdiction, FERC advises this Court to deny the petition on the claim that interpretation of section 1(b) is committed to the discretion of Commission under *Chevron*. That is wrong, and begs the question to be resolved by this Court. Petitioners' position (like that of Judge Edwards in dissent) is that the decision below on jurisdiction is contrary to this Court's authoritative construction of section 1(b) in *Northern Natural Gas Co.* v. *State Corp. Commission*, 372 U.S. 84 (1963), and other precedents. The central error of the court of appeals is its holding that the basic jurisdictional terms of section 1(b) of the NGA are ones of "inherent ambiguity," Pet. App. 18a, and that federal jurisdiction is determined by any line drawn by FERC that is not "patently unreasonable." *Id.* at 19a-20a (internal quotation marks omitted). To the contrary, this Court has definitively construed section 1(b) to incorporate the distinctions drawn in Commerce Clause jurisprudence at the time of the NGA's enactment, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684 (1954), and in particular has held that the term "gathering" is "narrowly confined to the physical act[] of ... preparing [gas] for the first stages of distribution." *Northern Natural*, 372 U.S. at 90.

In the NGA, Congress did not extend federal statutory jurisdiction to the full domain of interstate commerce, but did grant the FERC exclusive jurisdiction over "that interstate segment which the states were powerless to regulate because of the Commerce Clause" – namely, interstate sales for resale and interstate transportation. *FPC* v. *Panhandle E. Pipe Line Co.*, 337 U.S. 498, 503, 510 n.15 (1949). States were not entitled to regulate interstate transportation, but could regulate the "preparatory gathering" of goods *prior* to interstate transportation. *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U.S. 469, 475 (1926); *Carson Petroleum Co.* v. *Vial*, 279 U.S.

95, 102-03 (1929). States could thus regulate and tax the "gathering" of natural gas, but only if there was an identifiably "distinct local activity" of gathering that could be differentiated from "a separate movement in commerce." *Michigan-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 167 (1954). These Commerce Clause distinctions were incorporated in the NGA, subject to the rule that exemptions from NGA jurisdiction should be strictly construed. *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690-91 (1947). Accordingly, this Court ruled in *Northern Natural* that the "gathering" exemption from FERC jurisdiction is "narrowly confined to the physical act[] of ... preparing [gas] for the first stages of distribution." 372 U.S. at 90. As Judge Edwards stated in dissent below, any FERC determination of "gathering," without identification of a distinct physical act of preparing the gas for further distribution, "is unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.*" Pet. App. 35a.; see Pet. 10-22; Reply Br. 1-4.

Thus, the jurisdictional question presented by this petition is a *Chevron* Step 1 question. The reasonableness of any possible future reformulation of FERC's "gathering" test under *Chevron* Step 2 is irrelevant because FERC does not have authority to depart from this Court's authoritative construction of the statute in *Northern Natural* and the other precedents cited above. *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). The fundamental question of statutory interpretation presented by this petition will thus be unaffected by any future rulemaking FERC undertakes pursuant to the August 14, 2003 notice. Indeed, if anything, this Court should resolve this fundamental question first so that the FERC can formulate a new test in line with this Court's guidance.

2. Similarly, on the abandonment issue, petitioners contend that, as a matter of the plain meaning of section 7(b) of the

Act, FERC cannot permit a pipeline to abandon jurisdictional service without finding that such abandonment is in the public interest. Pet. 22-27; Reply Br. 6-7. The abandonment ruling below has resulted in an acknowledged circuit split, see Petitioners' First Supp. Br. 2-3, and this critical issue cannot be left unresolved over the potentially lengthy period of FERC's reconsideration. Only this Court can finally resolve the conflict between the circuits.

3. In all events, FERC's admission that the *Sea Robin* test applied below is arbitrary and inconsistent with the NGA, and FERC's rethinking of whether the D.C. Circuit or the Fifth Circuit is right on the abandonment issue, are not grounds for denying the petitions. They instead provide strong reason for this Court to *grant* the petitions and resolve the questions presented, or at a minimum, to grant the petitions, vacate the judgment of the court of appeals and remand the case so that FERC can reconsider the correct disposition of this case in light of any revised standards. An agency's second thoughts are not a basis for allowing a judgment based on erroneous legal rules that are the subject of clear and important conflicts of authority to become final.

FERC is wrong to suggest that the question of the proper classification of the Sea Robin system could be revisited after it reformulates its offshore gathering test in a separate rulemaking. FERC Supp. Br. 5. Under current FERC precedent upheld by the D.C. Circuit, Sea Robin is free at any time to transfer its newly designated gathering facilities to an unregulated affiliate or independent company (as other OCS pipelines have already done) without any public-interest review by FERC. Petitioners' First Supp. Br. 1, 3, App. 14a-19a. Once such a transfer is final and the Sea Robin system is broken up into two different systems, the jurisdictional status of the *current*, single interstate Sea Robin pipeline system cannot be redetermined later. The reliance interests of Sea Robin's captive producers will be prejudiced.

In sum, the questions presented concerning NGA regulation of OCS pipelines are extraordinarily important and require immediate resolution. OCS pipelines are being rapidly deregulated from NGA jurisdiction under a *Sea Robin* test that the FERC now admits is arbitrary and contrary to the statute, and an abandonment rule that allows certificated pipelines to be transferred to nonjurisdictional pipeline companies without any finding that abandonment is in the public interest. As FERC concedes, captive producers who have relied on the NGA regulation of an OCS transportation pipeline in making investment decisions "find themselves subject to the market power of that transporter in its new deregulated form." FERC Supp. Br. App. 10a. That is contrary to the very purpose of the NGA, which is to protect producers and the public from the monopoly power of interstate pipelines. *Public Serv. Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 327 (1983). In a time of substantial concerns over the nation's supply of natural gas, regulatory uncertainty and pipeline market power on the OCS – the nation's largest single source of natural gas – are simply untenable. This Court's review is imperative.

CONCLUSION

The petition should be granted and the questions presented decided by this Court. Alternatively, the petition should be granted, the judgment below vacated and the matter remanded so that the FERC can apply any new standards it devises to the Sea Robin system.

Respectfully submitted,

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September 12, 2003

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No. 02-1265

Supreme Court, U.S.
FILED
MAY 30 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

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v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* NATURAL GAS SUPPLY ASSOCIATION AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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10 pp

QUESTIONS PRESENTED *

1. Whether the rule mandating strict construction of exemptions from the Federal Energy Regulatory Commission's jurisdiction under the Natural Gas Act applies to offshore transportation pipelines.

2. Whether a pipeline that obtained a certificate of public convenience and necessity from the Commission to provide transportation service may abandon that jurisdictional service upon reclassification of its facilities without any findings by the Commission that abandonment is in the public interest.

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* *Amici curiae* Natural Gas Supply Association and Independent Petroleum Association of America adopt the questions presented as framed by Petitioners.

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BRIEF OF *AMICI CURIAE* NATURAL GAS SUPPLY ASSOCIATION AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE* [1]

The Natural Gas Supply Association is an incorporated not-for-profit trade association representing the interests of natural gas producers. The Natural Gas Supply Association represents the majority of the large integrated and independent companies that produce and market domestic natural gas.

[1] No counsel for a party authored any portion of this brief, nor did any person or entity other than the *amici curiae* make any monetary contribution to the preparation or submission of the brief.

The Natural Gas Supply Association encourages expanded use of natural gas and a regulatory climate that fosters competitive markets.

The Independent Petroleum Association of America is an incorporated not-for-profit trade association representing the interests of thousands of independent oil and natural gas producers across the United States. Independent producers drill 85% of the wells in the United States, produce 65% of the country's natural gas, and produce 40% of domestic oil supplies.

STATEMENT

Natural gas produced on the Outer Continental Shelf ("OCS") in the Gulf of Mexico contributes over 5 trillion cubic feet per year to domestic natural gas supplies. Energy Information Administration, *Annual Energy Outlook* 140 (2003). This represents over twenty-five percent of current U.S. supplies. *Id.* Seventy percent of existing OCS production remains in non-deepwater areas of the OCS. Energy Ventures Analysis, Inc., *Fuelcast: Short-Term Overview* 3-29 (2003).

The potential future contribution of OCS supplies toward meeting increased natural gas demand is vast. Potential reserves in deepwater areas of the OCS are extensive. New deepwater production technology also may extend the economic life of existing OCS production in shallow waters.

Substantial expenditures are required for offshore development. An average offshore well costs $4.3 million. Office of Fossil Energy, *Environmental Benefits of Advanced Exploration and Production Technology* 34 (1999). Large offshore projects can cost more than a billion dollars. As additional offshore producing areas are developed, the contribution made by the OCS to the overall supply of natural gas will remain significant. An average of 200 Tcf of

estimated recoverable resources exists in the Gulf of Mexico. Minerals Management Service, *Outer Continental Shelf Petroleum Assessment* 5 (2000).

Offshore exploration and production activities depend in large part on the availability of economical natural gas pipeline transportation infrastructure. The Federal Energy Regulatory Commission's ("FERC") mandate is to ensure that such infrastructure exists and to establish rates for use of that infrastructure that are just and reasonable; however, in the orders that are the subject of the petition in this case, FERC failed to exercise its mandate. FERC determined that it should "reclassify" as a "gathering" facility exempt from its Natural Gas Act ("NGA") jurisdiction the largest part of an offshore natural gas transportation pipeline long regulated by FERC, and it permitted the Sea Robin pipeline to terminate its existing interstate jurisdictional transportation service without the public-interest inquiry required by the NGA's abandonment provisions. In upholding the FERC's actions, the D.C. Circuit disregarded both the statute FERC administers and the decisions of this Court, for the reasons explained in detail by the petitioners. The consequences of this decision, if not reversed by this Court, will inhibit substantially the economic development of OCS natural gas resources.

REASONS FOR GRANTING THE PETITION

Because petitioners have amply demonstrated the error of the D.C. Circuit decision and its inconsistency with the plain meaning of the statute and judicial precedent, this brief will emphasize the importance of this Court's immediate review of the questions presented. Put simply, the D.C. Circuit's decision in *ExxonMobil Gas Marketing Co., a Division of Exxon Mobil Corp. v. Federal Energy Regulatory Comm'n*, 297 F.3d 1071 (D.C. Cir. 2002) ("Sea Robin decision") threatens to undermine OCS development and to disrupt the

settled reliance interests of parties investing billions of dollars in offshore development ventures, to the ultimate detriment of producers and consumers alike.

For thirty years, the Sea Robin system was subject to rate regulation by FERC and its predecessor. Long-term investment decisions were made by producers against this settled regulatory background. Much of the production attached to the Sea Robin system is from mature producing areas that have no economically viable alternative source of transportation service.

Based on a flawed interpretation of the jurisdictional and abandonment provisions of the Natural Gas Act, the court of appeals upset settled expectations of producers and established a precedent that now releases thousands of miles of OCS pipeline from rate controls, paving the way for pipeline owners to exercise market power over captive OCS shippers.

The issue presented by this case is not limited to one interstate pipeline system. The consequences of this decision are not confined to the litigants themselves, or to the industry in which they function. In reliance on the Sea Robin precedent, FERC has reversed longstanding past jurisdictional determinations in other proceedings involving other traditionally regulated interstate pipeline systems. *See, e.g., Transcontinental Gas Pipe Line Corp.*, 97 F.E.R.C. (CCH) ¶ 61,298 (2001); *Enron Gulf Coast Gathering, Ltd. Partnership*, 95 F.E.R.C. (CCH) ¶ 61,318 (2001). Additional regulated offshore transportation systems can be expected to seize the market power the Sea Robin policy confers upon them.

For its part, FERC has recognized recently that exorbitant charges for offshore gathering can frustrate FERC's ability to regulate jurisdictional interstate transportation. *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, 103

F.E.R.C. (CCH) ¶ 61,177, at P 21 (2003). FERC has acknowledged that such tactics ultimately harm consumers and that the related distortion of production and investment decisions also can be contrary to the public interest. Notwithstanding these findings, FERC continues to adhere to its flawed Sea Robin policy, compounding these adverse consequences.

The D.C. Circuit's evisceration of the rule that exemptions from the FERC's NGA jurisdiction are strictly construed, *see Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 690-91 (1947), and the attendant uncertainty as to the scope of FERC's jurisdiction over OCS pipelines, not only upset settled reliance interests, but also create untenable investment risk that will affect future production. Producers may forego much highly capital-intensive OCS investment because of the significant risk that, after the investment is made, pipelines that are free of NGA rate regulation will be able to charge monopoly prices to bring natural gas to shore. Until this Court resolves the dispute over the scope of FERC NGA jurisdiction, OCS production and investment decisions will take place in a climate of regulatory uncertainty, which is inimical both to the nation's economy and its energy security.

The optimization of offshore producing reserves depends on the availability of economical transportation service. The orders that are addressed in the petition place in jeopardy future OCS production on traditionally regulated interstate pipeline systems, in a manner that is neither contemplated nor countenanced by the Natural Gas Act. This Court must resolve the fundamental issues of FERC regulatory authority on the OCS presented by this case.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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May 30, 2003

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